No. 83-929

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IN THE

Supreme Court of the United States

October Term, 1983

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, et al.
Defendants-Appellants,

DOUGLAS T. SMITH, et al.
Intervenors-Appellants,

v.

ISHMAEL JAFFREE, et al.
Appellee.

GEORGE C. WALLACE, Governor, et al.
Defendants-Appellants,

DOUGLAS T. SMITH, et al.
Intervenors-Appellants,

v.

ISHMAEL JAFFREE, et al.
Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JURISDICTIONAL STATEMENT

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Questions Presented

1. Does a moment of silence for individual silent "prayer or meditation" at the beginning of each school day in a public school classroom violate the Establishment Clause of the First Amendment as interpreted by its language, framers' intent, and history?

2. Did the terms of the Fourteenth Amendment and the intent of the Thirty-ninth Congress and the ratifying state legislatures that adopted it render the Establishment Clause applicable to the states, amending the First Amendment and thereby giving the federal courts jurisdiction over state religious establishments?

3. Does the Tenth Amendment prohibit the federal courts from asserting jurisdiction over state religious establishments if the Fourteenth Amendment and its framers' intent did not apply the Establishment Clause to the states?

4. Even if the Establishment Clause is applicable to the states, does the unique history of the Establishment Clause, including the Northwest Ordinance of the First Congress (providing for the teaching of religion and morality in federally-funded schools), guarantee the right of public school students and teachers to pray, either individually or by classroom activity, and the state of Alabama the right to protect this freedom by statute, without violation of the Establishment Clause?

5. Is the United States Supreme Court, in interpreting the Establishment Clause of the First Amendment of the United States Constitution, bound by its precedents that conflict with the terms, intent, and historical context of the Constitution?

List of All Parties

Undersigned counsel of record for Intervenors-Appellants certify that the following listed parties have an interest in the outcome of this case.

Ishmael Jaffree, Jamel Aakki Jaffree, Makeba Green and Chioke Saleem Jaffree, named plaintiffs herein.

The Board of School Commissioners of Mobile County, Alabama; the Mobile County School Board Commissioners, Dan C. Alexander, Dr. Norman Berger, Hiram Bosarge, Norman G. Cox, Ruth Drago and Dr. Robert Gilliard; Dr. Abe Hammons, Superintendent of the Board of Education of Mobile County; Mobile County School teachers, Julia Green, Charlene Boyd and Pixie Alexander; Mobile County School principals, Annie Bell Phillips, Betty Lee and Emma Reed.

Defendants-Intervenors: Bobby and Emily Cook, Thomas and Sibyll Bends, Linda Drashman, Mrs. Steve Cooper, Joanne DeBenedetto, Bill Flowers, Vonna Tuberville, Mrs. Ralph O. Kelly, Joel C. Kelley, Lamar Guyton, Mrs. Abbie D. Tamblyn, Joseph R. Thompson, Bill Norton, Wayne Ward, Faye R. Sellers, Billie Jack Mitchell, Sr., Glenn Wiley, Tom Jones, James M. Dodd, Jr., Judith R. Dodd, William Glen Byron, Bobby Schiferly, Mr. and Mrs. A.W. Lawrence, Eva Hendrix, Dorothy K. Chancy, Ed and Carol Lietz, Cindy Elliott, G.N. Burrows, Paul J. Reid, John V. Hendrix, Julia A. Reib, Mary Taylor, Rev. and Mrs. Joseph L. Garlington, R. Bruce Vandiver, Mrs. R. Bruce Vandiver, Mrs. R.F. Wallace, Mrs. Moya Wells, Mr. Larry Wells, Wanda Brooks, Jerry Brooks, Ronald Glaze, Myra Thompson, Betsy Miller, Barbara Williams, Jack Christensen, Donald E. Thompson, Sonja Thompson, Jacqueline R. Peters, Michael J. Puckett, A. Rodney Applegate, Jr., J.E. Solomon, Virginia Stonestreet, Marti Pulliam, Jimmy Jones, Marie Woodham, Susan S. Hahn, Tim McGraw, Charles R. Smith, Mr. and Mrs. Jefferson C. McGee, George E. Fisher, Chris Evans, Don Sissons, Georgia McCarge, David Fowler, Debra Fowler, Christine Walker, Francis Sissions, Jill Fletcher, Eileen H. Rodgers, Shelby A. Sutton, Mr. and Mrs. Ronnie Connell, Mr. and Mrs. A.B. Grantham, Mr. and Mrs. Douglas W. Estis, Eva Ross, Joyce Harlow, V.D. Morgan, Veronica Morgan, Aleene Renould, Meloney

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No. _____

IN THE

Supreme Court of the United States

October Term, 1983

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, et al.

Defendants-Appellants,

DOUGLAS T. SMITH, et al.

Intervenors-Appellants,

v.

ISHMAEL JAFFREE, et al.

Appellee.

GEORGE C. WALLACE, Governor, et al.

Defendants-Appellants,

DOUGLAS T. SMITH, et al.

Intervenors-Appellants,

v.

ISHMAEL JAFFREE, et al.

Appellee.

Opinions Below

The Preliminary Injunction of the United States District Court, Southern District of Alabama, Southern Division, was issued and reported on August 9, 1982, in *Jaffree v. James*, 544 F. Supp. 727

(S.D. Ala. 1982) (reprinted in Appendix to Jurisdictional Statement of George C. Wallace at 64d A. All references to the Appendix of Wallace will be followed by A). This Preliminary Injunction was later vacated by the Order of the court issued and reported on January 14, 1983, in *Jaffree v. James*, 554 F. Supp. 1130 (S.D. Ala. 1983) (reprinted in Appendix at 56d A). The Memorandum Opinion in the companion case was issued and reported on the same day in *Jaffree v. Board of School Commissioners of Mobile County*, 554 F. Supp. 1104 (S.D. Ala. 1983) (reprinted in Appendix to Writ of Certiorari of Board of School Commissioners of Mobile County at 1d B. All references to the Appendix of the Board will be followed by B). The United States Court of Appeals for the Eleventh Circuit denied the appellant's request for emergency relief from the district court Opinion, but Justice Powell, as Circuit Justice, stayed the judgment pending appeal on February 11, 1983, in *Jaffree v. Board of School Commissioners of Mobile County*, ___ U.S. ___, 103 S. Ct. 842 (Feb. 11, 1983) (Powell, J. as circuit justice) (reprinted in Appendix at 3e B). The two cases were consolidated upon appeal, and Governor George C. Wallace was substituted for Governor Fob James. The Opinion of the United States Court of Appeals for the Eleventh Circuit, affirming in part and reversing in part, and remanding with directions, was issued on May 12, 1983, in *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983) (reprinted in Appendix at 1a B). The Per Curiam Decision of the court of appeals denying the petition for rehearing and suggestion for rehearing en banc, with an accompanying dissent written by Judge Roney, was issued on August 15, 1983, in *Jaffree v. Wallace*, 713 F.2d 614 (11th Cir. 1983) (reprinted in Appendix at 1b B). The district court then issued an Order enforcing the Order of the court of appeals and enjoining the statutes and activities there held to be unconstitutional, on October 14, 1983 (reprinted in Appendix at 56d B).

Jurisdiction

Jurisdiction of this Court, to review the final judgment of the court of appeals that held a state statute or an activity treated as a state statute unconstitutional, is conferred by 28 U.S.C. § 1254(2).

The subject of this case is (1) the constitutionality of two separate state statutes passed by the Alabama legislature which (a) permit a

teacher to begin the day with a period of silence for "meditation or voluntary prayer" (ALA. CODE § 16-1-20.1) and which (b) permit a teacher to lead willing students in verbal prayer to God at the beginning of any class or homeroom (ALA. CODE § 16-1-20.2). The final subject of this case is (2) the constitutionality of individual teachers' leading their willing students in verbal prayer without any policy having been established by the school board. The court of appeals held that the Board of School Commissioners ratified the teachers' voluntary prayer activities since it had notice of them. *Jaffree v. Wallace*, 705 F.2d at 1534-35.

The district court, after hearing extensive testimony and receiving considerable evidence as to the history and intent of the drafters of the First and Fourteenth Amendments, held that the federal courts did not have jurisdiction over state religious activities or establishments for the reason that the terms, intent, and history of the Fourteenth Amendment show that it did not apply the Establishment Clause to the states. The court of appeals, relying on precedents of this Supreme Court, reversed, holding that both the statutes and the voluntary teacher activities (which the court of appeals held the Board had ratified) were unconstitutional.[1] A Notice of Appeal by the Appellant-Intervenors (the Defendant-Intervenors at the trial court) was filed on November 2, 1983, (reprinted in Appendix 3a). Appellant-Intevenors were granted an extension of time, in which to docket their appeal until December 3, 1983, by Justice Powell on November 7, 1983.

Constitutional and Statutory Provisions

The Appendix contains in full the following provisions: Article VI, clause 2 and First and the Tenth Amendments of the United States Constitution (at 1a); the relevant portions of the Fourteenth Amendment of the United States Constitution (at 1a) and of the Northwest Ordinance (at 2a); and ALA. CODE §§ 16-1-20.1 and 16-1-20.2 (at 2a).

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[1] "If the Supreme Court errs, no other court may correct it." *Jaffree v. Wallace*, 705 F.2d at 1533, relying on *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, ___ U.S. ___, 103 S. Ct. 1343, 1344 (1983).

Statement of the Case

On May 28, 1982, Appellee, Ishmael Jaffree (hereinafter "Jaffree"), on behalf of his three minor children enrolled in the Mobile, Alabama public school system, brought this action against the Board of School Commissioners of Mobile County, Alabama, the principals of the three schools his children attended, and his children's teachers. He alleged that the teachers (two black and one white), at their own initiative and in the absence of a school board policy, had led willing students in a voluntary saying of a simple grace before meals, such as "God is great, God is good, and we thank Him for our food. By His hands we all are fed, give us Lord our daily bread . . . " and "For health and strength and daily food we praise Thy name, O Lord."[2] (R. 1-9)[3] Jaffree requested a permanent injunction against (1) *all activities* designed to encourage a belief in religion, and (2) all teaching from *all instructional materials* which further a belief in religion. (R. 8,9). Jaffree then amended his complaint to ask that two separate Alabama statutes be declared unconstitutional: ALA. CODE § 16-1-20.1, providing a one-minute period of silence at the beginning of the school day "for meditation or voluntary prayer"; and ALA. CODE § 16-1-20.2 (Act No. 32-753, enacted July 8, 1982, some 41 days after Jaffree's original complaint), authorizing teachers to lead willing students in prayer and providing a suggested prayer.[4] Governor Fob James was added as a named defendant. (R. 92-100).

The trial judge, Judge W. Brevard Hand, severed Jaffree's various requests for relief into two separate causes of action: 82-0554-H, which concerned the requests for relief against the teachers and local school board, and 82-0792-H, which dealt with the constitutionality of the Alabama statutes. (R. 282). On August 9, 1982, the district court issued a preliminary injunction (R. 703-14) against the en-

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[2] *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1107. The first prayer, correctly stated here, was misquoted by the court of appeals.

[3] "(R. ___)" designates Record on Appeal; "(T. ___)" designates Trial Transcript.

[4] The language quoted by the court of appeals is from the bill as introduced into the legislature. *See* Constitutional and Statutory Provisions, *supra*, for the language as enacted.

forcement of the two statutes (82-0792-H). The court stated, however, that "[t]his Court will not by judicial fiat delineate what a teacher or student may do in regard to his personal religious benefits for these are matters of personal conscience."[5] (R. 721).

On August 2, 1982, seventeen people (R. 252-57) were allowed to intervene as party defendants. (R. 704). Following a motion filed October 22, 1982, 607 additional teachers, parents and students were allowed to join the original seventeen and have since continued as Intervenors. (R. 424). The Defendant-Intervenors, through their counsel, actively participated in the trial on the merits, November 15-18, 1982, by the presentation of five expert witnesses and three teachers, one parent, and one student as witnesses, as well as by cross-examination, oral arguments, and briefs.

On September 15, 1982, Governor Fob James attempted to file in this Court, under Supreme Court Rule 26, a Petition for a Writ of Mandamus[6] to instruct the Chief Judge of the U.S. District Court for the Southern District of Alabama, Southern Division, to dismiss the case before him for lack of federal jurisdiction over the religious activities within the states. The Clerk of the Court refused to accept the petition so that this Court never had the opportunity to determine whether to use its discretionary powers under 28 U.S.C. § 1651.

On January 14, 1983, the district court entered orders in each case dismissing the claims for want of jurisdiction, stating:

> This Court's review of the relevant legislative history surrounding the adoption of both the first amendment and of the fourteenth amendment, together with the plain language of those amendments, leaves no doubt that those amendments were not intended to forbid religious prayers in the schools which the states and their political subdivisions mandate. . . .
>
> Because the establishment clause of the first amendment

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[5] *Jaffree v. James*, 544 F. Supp. at 733.

[6] *See* Brief of the Governor of Alabama, captioned *In Re the State of Alabama by Its Governor Fob James, Petition for a Writ of Mandamus*, Defendant-Intervenors' Ex. 15.

> to the United States Constitution does not prohibit the state from establishing a religion, the prayers offered by the teachers in this case are not unconstitutional. Therefore, the Court holds that the complaint fails to state a claim for which relief could be granted.[7]

The plaintiff appealed to the Eleventh Circuit Court of Appeals (R. 522), which denied his motion for emergency relief seeking a stay of Judge Hand's order. On February 2, 1983, Justice Lewis F. Powell temporarily granted Jaffree's application seeking a stay of the judgments of the district court. On February 11, 1983, Justice Powell continued the stay, stating: "Unless and until this Court reconsiders the foregoing decisions [*Engel v. Vitale*, 370 U.S. 421 (1962) and *Murray v. Curlett*, decided with *Abington School District v. Schempp*, 374 U.S. 203 (1963)], they appear to control this case."[8]

On May 12, 1983, the three-judge panel[9] of the court of appeals reversed the district court's dismissal of the two cases holding that the one-minute period of silence for meditation or prayer (§ 16-1-20.1), as well as the teacher-initiated prayers for willing students, and the statute authorizing prayer (§ 16-1-20.2) were violations of the Establishment Clause, holding that the school board had ratified the teachers' activities.[10] The court further held that the Establishment Clause prohibited "any government involvement with religion" and that "the state cannot participate in the advancement of religious activities through any guise, including teacher-led meditation," implying that teachers may not discuss any religious matters in public school.[11] On August 15, 1983, the court denied defendants-appellees' petition for rehearing and suggestion for rehearing en banc.

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[7] *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1128 and *Jaffree v. James*, 554 F. Supp. at 1130.

[8] *Jaffree v. Bd. of School Comm'rs*, ___ *U.S.* ___ 103 S. Ct. at 843.

[9] Honorable Charles R. Scott, U.S. District Judge for the Middle District of Florida, sitting by designation, died the day the decision was issued.

[10] *Jaffree v. Wallace*, 705 F.2d at 1533-36. Governor George C. Wallace was substituted for former Governor Fob James prior to the court of appeals ruling.

[11] *Id.* 705 F.2d at 1531 and 1536.

A dissent by four judges on the court of appeals, written by Judge Roney, argued that the statute providing for a moment of silence for meditation or voluntary prayer, is neutral and "facially and operationally constitutional."[12] ALA. CODE § 16-1-20.1.

The consolidated cases are now before this Court pursuant to appeals by the State of Alabama, the Board of School Commissioners of Mobile County, and the Defendant-Intervenors, the 624 affected teachers, parents, and students on whose behalf this brief is filed.

Reasons Why Questions Presented Are Substantial

Introduction

The federal courts have attempted to usurp the authority of God by asserting jurisdiction over prayer. Conversations with or petitions to our Lord are under His authority.

It is absurd to claim that all religions are equally valid. No, the Lord God is One, as our Founding Fathers recognized in the Declaration of Independence and other documents on which the colonies were established. It is idolatrous to assert that He is one among many. He is the only One.

But since the courts have claimed jurisdiction over prayer and audaciously rejected the Lord's sovereignty, the only thing left to appeal to which this Court should still recognize is the United States Constitution, whose language, intent, and history contradict this Court's position.

Further, the holding of the Eleventh Circuit Court of Appeals in this case has created a crisis in public education because of the uncertainties it causes as to what religious speech and activities are now permissible and because of the chilling effect the court's broad prohibition has on teacher and student free speech and free exercise of religion. The court below ruled that "a period of silence . . . for meditation or voluntary prayer" is unconstitutional,[13] an issue on

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[12] *Jaffree v. Wallace*, 713 F.2d at 616.

[13] *Jaffree v. Wallace*, 705 F.2d at 1528.

which the federal courts are split.[14] Additionally, it ruled that the Establishment Clause prohibited "any government involvement with religion"—prohibiting teacher-led voluntary prayer and meditation.[15] The first holding is incorrect under current law, in our view. The second holding is incorrect under the language, intent, and history of the Fourteenth Amendment and of the First Amendment.

The district court below held that current law conflicts directly with the Constitution so that the latter must be followed. The Opinion relied heavily on the recent scholarship of Professor Raoul Berger of Harvard Law School in GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) on the language, intent, and history of the Fourteenth Amendment and of Professor Robert L. Cord of Northeastern University in SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982) on the language, intent, and history of the Establishment Clause of the First Amendment, as well as the scholarly testimony of James McClellan, former professor at Emory University and former Chief Counsel to the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary. In terms of the correctness of current law, the district court stated:

> Consistency no longer exists. Where you cannot recite the Lord's Prayer, you may sing his praise in God Bless America. Where you cannot post the Ten Commandments on the wall for those to read if they do choose, you can require the Pledge of Allegiance. Where you cannot acknowledge the authority of the Almighty in the Regent's prayer, you can acknowledge the existence of the Almighty in singing the verses of America and Battle Hymn of the Republic. It is no wonder that the People perceive that justice is myopic, obtuse, and janus-like.[16]

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[14] *See, e.g., Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976) and *Reed v. Van Hoven*, 237 F. Supp. 48 (D. Mich. 1965). *See contra Duffy v. Las Cruces Pub. Schools*, 557 F. Supp. 1013 (D.N.M. 1983) and *May v. Copperman*, ___ F. Supp. ___ (D.N.J. 1983).

[15] *Jaffree v. Wallace*, 705 F.2d at 1531.

[16] *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1129. One of the reasons advanced by the Court in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938) for

The appellate court's interpretation of the Establishment Clause would have been repugnant to a member of the First Congress that drafted it in 1789. When several representatives feared the clause might be taken as showing hostility to all religions, they were assured by its author, James Madison, that it was only intended to prevent the establishment of a national religion or sect.[17]

The appellate court failed to consider either these debates or the early acts of Congress which encouraged the teaching of religion and morality in the public and private schools of the Northwest Territory and the propagation of the gospel in Indian schools.[18] The men who adopted the Establishment Clause believed that "[r]eligion, morality, and knowledge, [were] necessary to good government and the happiness of mankind, [and that therefore] schools and the means of education [which taught religion, morality, and knowledge should] forever be encouraged."[19]

The 624 teachers, parents, and students who are the Appellant-Intervenors ask this honorable Court to examine the historical evidence presented for the first time by the adversarial system in the trial court below and to put an end to the present crisis in free speech and free exercise of religion by returning to the original intent of the Establishment Clause.

I.

A Moment For Individual Prayer or Meditation at the Beginning of Each School Day in Public School Classrooms Does Not Violate the Establishment Clause of the First Amendment.

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overturning *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) was "the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law [which] developed a new well of uncertainties."

[17] *See* speeches of Peter Sylvester, Benjamin Huntington and James Madison, 1 ANNALS OF CONGRESS 729-31 (August 15, 1789).

[18] *See* R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION, 42-43, 62-79, 261-70 (1982), introduced into evidence as Defendant-Intervenor Ex. 14, excerpted in Brief of the Appellee-Intervenors to the Eleventh Circuit Court of Appeals at Appendix II.)

[19] Northwest Ordinance, art. III, 1 Stat. 52 (Aug. 7, 1789).

A crisis in public education now exists as a result of the Establishment Clause decisions of the federal judiciary during the last thirty-six years. Educators and students alike are bewildered by incongruous decisions such as *Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976) (upholding a statute requiring a period of silence for prayer or meditation) and *Reed v. Van Hoven*, 237 F. Supp. 48 (D. Mich. 1965) (upholding the rights of students to meet before or after school to pray and read the Scriptures) as contrasted with the decision of the court of appeals below which overturned a statute authorizing silent prayer or meditation and prohibited voluntary prayer.[20]

Judge Roney, dissenting with three other judges from the denial of the petition for rehearing in this case by the Eleventh Circuit, noted that the issue of the constitutionality of a moment of silence for meditation or voluntary prayer has not been definitively resolved by the federal courts. *Jaffree v. Wallace*, 713 F.2d at 614. Citing a number of the leading constitutional scholars on the issue, he relies on First Circuit Chief Judge Coffin, writing the three-judge panel decision in *Gaines v. Anderson*, 421 F. Supp. at 343. Judge Coffin notes how such a statute "accommodate[s] students who desire to use the minute of silence for prayer or religious meditation, and also other students who prefer to reflect upon secular matters.[21]

This Court has upheld the right of state legislatures and Congress

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[20] *Jaffree v. Wallace*, 705 F.2d at 1537. Although the Supreme Court of Massachusetts struck down the voluntary prayer and meditation statute referred to above in *Kent v. Comm'r of Educ.*, 402 N.E.2d 1340 (1980), the federal district court decision in *Gaines v. Anderson* has not been overruled. *See also Opinion of the Justices*, 228 A.2d 161 (N.H. 1967), upholding a bill requiring a period of silence for meditation or the placement in each classroom of a plaque bearing the words "In God We Trust".

Federal court decisions which prohibit in-class prayer include *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd* 445 U.S. 913 (1982); *Beck v. McElrath*, 548 F. Supp. 1161 (M.D. Tenn. 1982); *Duffy v. Las Cruces Pub. Schools*, 557 F. Supp. 1013 (D.N.M. 1983); *Collins v. Chandler Unified School Dist.*, 644 F.2d 759 (9th Cir. 1981); and *May v. Cooperman*, ___ F. Supp. ___ (D.N.J. 1983).

[21] Justice Brennan, concurring in *Abington School Dist. v. Schempp*, 374 U.S. at 281 & n. 57 (1963), suggested that "the observance of a moment of reverent silence at the opening of class" would likely meet the test of constitutionality.

to use funds to pay a chaplain to pray before legislative sessions. *Marsh v. Chambers*, ___ U.S. ___, 103 S. Ct. 3330 (1983). Elementary school children and high school students may hear these officially-sponsored prayers offered when visiting their state or federal capitals.

This Court has protected the right of state university students to assemble on public property for prayer and Bible study. *Widmar v. Vincent*, 454 U.S. 263 (1981).

And this Court has specifically ruled that neither "students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Community School District*, 393 U.S. 503, 506 (1969).

Appellant-Intervenors petition this Court to reexamine the intent of the drafters of the First and Fourteenth Amendments to return this nation to the true meaning of the Establishment Clause.

II.

The Language, Intent, and History of the Fourteenth Amendment Prove that Congress and the Ratifying State Legislatures Never Intended to Make the Establishment Clause Applicable to the States. Thus the Court of Appeals Violated the Tenth Amendment in Striking Down the Challenged Alabama Statutes and Practices.

A. The Purpose of the Fourteenth Amendment Was To Limit the Power of the States only when They Failed To Afford Due Process of Law or Equal Protection of Law to Their Citizens.

When the court of appeals below struck down ALA. CODE §§ 16-1-20.1 and 16-1-20.2, and restrained public school teachers from individually leading willing students in prayer, the court assumed jurisdiction over religious practices within states which was never delegated to the federal government. The court of appeals relied on the Fourteenth Amendment as rendering the Establishment Clause applicable to the states.

However, the district court below held, after extensive review of the evidence of intent and history, that the due process clause of the Fourteenth Amendment does not and was never intended to apply

the Establishment Clause to the states. *Jaffree v. Board of School Commissioners*, 554 F. Supp. at 1124. The district court below relied *inter alia* on Professor Raoul Berger of Harvard Law School, who exhaustively and conclusively demonstrates this in GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT.[22] The court also relied on a scholarly article by Professor Charles Fairman, then of Stanford Law School, entitled: *Does the Fourteenth Amendment Incorporate the Bill of Rights?*[23]

After 431 pages of discussion with many hundreds of footnotes, Professor Berger concludes that:

> The historical records all but incontrovertibly establish that the framers of the Fourteenth Amendment confined it to protection of carefully enumerated rights against State discrimination, deliberately withholding federal power to supply those rights where they were not granted by the State to anybody . . .[24]

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[22]R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977), cited in *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1120-22 (excerpted in Brief of Appellee-Intervenors to the Eleventh Circuit Court of Appeals at Appendix IV.)

[23]Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5 (1949), cited in *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1119 (included by Appellee-Intervenors in their Brief to the Eleventh Circuit Court of Appeals as Appendix V). *See also* H. MEYER, THE HISTORY AND MAKING OF THE FOURTEENTH AMENDMENT: JUDICIAL EROSION OF THE CONSTITUTION THROUGH THE MISUSE OF THE FOURTEENTH AMENDMENT (1977), (excerpted in Brief of Appellee-Intervenors to the Eleventh Circuit Court of Appeals at Appendix VI and introduced in evidence as Defendant-Intervenors Ex. 15).

An impressive number of scholars have also written in support of the Fairman view and in opposition to Justice Black's extension of the Establishment Clause to the states. *E.g.* M. HOWE, THE GARDEN AND THE WILDERNESS 22-33 (1965); W. KATZ, RELIGION AND THE AMERICAN CONSTITUTIONS (1964); Katz, *The Case for Religious Liberty*, in J. COGLEY, RELIGION IN AMERICA 101 (1958); Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L. Q. 371; and J. O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION 10 (1949). *But see*, Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954).

[24]R. BERGER, *supra* note 22, at 407.

B. The Congressional Debates over the Fourteenth Amendment Do Not Contain a Single Reference to the Establishment Clause at All. Instead, the Sponsors of the Amendment Claimed that It Took No Powers Away From the States.

There is no reference to the Establishment Clause in the debates on the Fourteenth Amendment. Professor James McClellan, constitutional expert for appellants, testified that the issue of application of the Fourteenth Amendment to the states "was not even debated when the Fourteenth Amendment was prepared and drafted [by] Congress." (T. 544-45). Congress never viewed federal control of state establishments as one of its objectives or consequences.

Instead, both "radical" and "moderate" Republicans who controlled both the House and the Senate argued that it took no powers away from the states except to require them to apply their own due process requirements equally to all their citizens — regardless of race — and to protect the Civil Rights Act of 1866 from repeal by a future Democratic Congress.[25] Further, the House defeated the original version of the Fourteenth Amendment introduced by Rep. John Bingham of Ohio, which would have permitted Congress to legislate generally in this area.[26]

C. The Congressional Debates over the Fourteenth Amendment Do Not Contain Any Reference to the Application of the Bill of Rights or the Establishment Clause to the States.

As noted by the court below, the *only* reference in the debates to "the first eight amendments of the Constitution" is by Sen. Jacob

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[25] *See* Fairman, *supra* note 23, at 43-68.

[26] The text refers specifically to the privileges and immunities clause of Article 4, section 2 and the 5th Amendment to the Constitution:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States (Art. 4, sec. 2); and to all persons in the several States equal protection in the rights of life, liberty, and property (5th amendment).

JOURNAL OF THE JOINT COMMITTEE ON RECONSTRUCTION 17 (1915); CONG. GLOBE, 39th Cong., 1st Sess. 1033, 1034, 1095 (1866).

Howard, a Republican from Michigan, acting Senate Chairman of the Joint Committee on Reconstruction. *Jaffree v. Board of School Commissioners,* 554 F. Supp. at 1121-22. He believed that the "personal rights" of these eight amendments were included in the "privileges and immunities" guaranteed by the Constitution and Bill of Rights to citizens of the United States.

However, Sen. Howard included in his list of these "personal rights" only the personal judicial rights of trial by "impartial jury", being informed of accusations against oneself, of bail and no search and arrest without a warrant, and of no cruel and unusual punishments; and the personal non-judicial freedoms of speech, press, assembly, bearing arms, and exemption from quartering soldiers in one's home without consent.[27] He did not refer to the Establishment Clause as a "personal right" and did not believe it was to be included in the Privileges and Immunities Clause or in the Due Process Clause. He never stated in the debates that the amendment would interfere with the powers of the state vis-a-vis the federal government, as the power of a state to raise a militia or the power of a state to establish a religion.

Also, as noted by the district court below, both Rep. Bingham and Sen. Howard were unclear as to what would be accomplished by passage of the Fourteenth Amendment. *Id.* at 1120-22.[28] Justice Black relied on, as his sole evidence of the application of the Establishment Clause to the states, a statement by Rep. Bingham in 1871, five years after adoption of the Fourteenth Amendment during

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[27]CONG. GLOBE, *supra* note 26, at 2765.

[28]After defeat of the first draft of the Fourteenth Amendment, but prior to the second draft being completed, in debating the Civil Rights Bill, Rep. Bingham did say that only the state courts, and not federal courts, would have jurisdiction to enforce the Fourteenth Amendment:

> [T]he enforcement of the bill of rights, touching the life, liberty and property of every citizen of the Republic within every organized State of the Union, is of the *reserved powers of the States, to be enforced by State tribunals and by State officials* acting under the solemn obligations of an oath imposed upon them by the Constitution of the United States.

Id. at 1291, col. 1 (emphasis added).

debates over the Ku Klux Klan Act. Bingham then argued (as he never did in 1866) that the first eight amendments did so apply. He was vigorously opposed by Rep. Storm of Pennsylvania:

> Sir, if the views now announced by gentlemen on the other side of the House had then been promulgated, that *amendment would never have been ratified.* If the *monstrous doctrine* [especially giving the federal courts jurisdiction in cases applying the Bill of Rights to the states] now set up as resulting from the provisions of that Fourteenth Amendment had then been *hinted at,* that amendment would have received an emphatic rejection at the hands of the people.[29]

However, this was not even Rep. Bingham's view (much less that of Congress) in 1866, when the Fourteenth Amendment was adopted. Instead, Rep. Bingham said near the conclusion of the Fourteenth Amendment debates: "Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it."[30]

Justice Black, in relying on a *post factum* remark by Rep. Bingham, did not refer to this important facet of Bingham's views, which reflects his 1866 viewpoint.

Professor Bernard Schwartz, in his STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS, agrees that Bingham's statement in 1871 is far from conclusive. Schwartz notes that his speech was not adopted by Congress, but was a proposal to it for future actions to be taken.[31]

D. Congress Voted to Admit Nebraska into the Union, Forty-One Days After the Fourteenth Amendment was Proposed

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[29]CONG. GLOBE, 42nd Cong., 1st Sess., app. 84 (1871) (emphasis added). *See also* speech of Rep. J.A. Garfield of Ohio (who was later President of the United States), *id.* at app. 150.

[30]CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).

[31]B. SCHWARTZ, I STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 294, 306-07 (1970).

to the States, Despite a Provision in Its Constitution Inconsistent with the Bill of Rights.

Congress voted to admit Nebraska into the Union on July 27, 1866, which was forty-one days after Congress adopted the Fourteenth Amendment on June 16, 1866. The Nebraska Constitution of 1866, framed in preparation for statehood, explicitly provided that the legislature could authorize "trial by a jury of less than twelve men in inferior courts." NEB. CONST. art. II, § 5 (1866). When Nebraska's admission to the Union was debated at great length in Congress, not a single Representative or Senator took issue with the nonconformity of Nebraska's Constitution to the Seventh Amendment. The outcry in Congress instead was over the exclusion of blacks from suffrage, because the new Nebraska Constitution limited suffrage to whites (the Fifteenth Amendment not yet having been adopted). *Id.* at art. II, § 2.[32] This, the Thirty-ninth Congress did not believe that the first eight amendments applied to the states.

E. The Debates in the State Legislatures Ratifying the Fourteenth Amendment Do Not Contain a Single Reference to the Establishment Clause or the First Eight Amendments Being Made Applicable to the States.

During the ratification process of the Fourteenth Amendment, the numerous accounts of legislative debates as well as newspaper accounts of speeches by elected officials (many of whom were congressmen returning from the debates on the Fourteenth Amendment) do not contain any reference to the Establishment Clause or the first eight amendments being made applicable to the states.[33] Even Harry Flack, on whose book Justice Black relied in his dissent in *Adamson v. California*, 332 U.S. 46, 109 (1947), concluded after canvassing the political speeches of candidates in the 1866 election:

> [T]he general opinion held in the North . . . was that the

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[32]However, when a move was made to admit Nebraska on condition that its legislature renounce the discriminatory provision as to suffrage, both Sen. Howard and Rep. Bingham urged admission without condition. CONG. GLOBE, 39th Cong., 2d Sess. 184, 219, 359, 847, 1096, (1866).

[33]*See* Fairman, *supra* note 23, at 68-132. *But see* Crosskey, *supra* note 23, at 110-11.

> Amendment embodied the Civil Rights Act . . . There does *not* seem to have been *any statement at all as to whether the first eight amendments were to be made applicable to the States or not,* whether the privileges guaranteed by those amendments were to be considered as privileges secured by the amendment.[34]

Had state representatives seen that the Establishment or Free Exercise Clauses would now be applicable against their states, there certainly would have been a heated discussion of whether that application should occur, and of how state constitutions or laws would need to be changed.

In New Hampshire, for example, although the Toleration Act of 1819 granted complete freedom to all Christian sects, the state constitution still provided:

> [T]he *people of this state* have a right to empower, and *do hereby fully empower, the legislature to authorize* from time to time the several *towns,* parishes, bodies corporate, or religious societies within this state *to make adequate provisions, at their own expense, for the support* and maintenance *of public Protestant teachers of piety, religion and morality.*[35]

In Maryland the Constitution of 1868 declared a witness or juror incompetent if he did not believe "in the existence of God, and that under His dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefore in this world or the world to come." Officeholders were required to declare their "belief in the existence of God."[36]

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[34]H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 153 (1908) (emphasis added), cited in *Jaffree v. Bd. of School Comm'rs,* 554 F. Supp. at 1122.

[35]N.H. CONST. art. VI (1784) (emphasis added). Members of the House and Senate as well as the Governor were required by the New Hampshire Constitution arts. XIV, XXIX, and XLII to be "of the Protestant religion."

[36]MD. CONST. arts. 36 & 37 (1868); *see* McClellan, *The Making and the Unmaking of the Establishment Clause,* A BLUEPRINT FOR JUDICIAL REFORM 308-11 (1981) (Defendant-Intervenors Ex. 12, included in its entirety in Brief of Appellee-Intervenors to the Eleventh Circuit Court of Appeals as Appendix I). *Cf. Torcaso v. Watkins,* 367 U.S. 488 (1961).

In North Carolina, persons "who shall deny the being of Almighty God" were disqualified from holding public office.[37] Tennessee denied office holding to "any person who denies that the being of God, or a future state of rewards and punishments," and also denied a seat in the legislature to any "Minister of the Gospel."[38]

The total dearth of any such discussion powerfully undermines the erroneous proposition that the Fourteenth Amendment was intended to apply, or impliedly applied, the Establishment Clause to the states. Absent a specific intent to amend the Constitution and to apply the Establishment Clause to the states in clear language, the Tenth Amendment reserves that power to the states.

F. State Supreme Court Decisions Rendered Immediately after Passage of the Fourteenth Amendment Demonstrate that the First Eight Amendments and Especially the Establishment Clause Were Not Made Applicable to the States.

The Supreme Court of New Hampshire, five months after ratification of the Fourteenth Amendment by the states in July of 1868, explicitly concluded that the matter of an establishment of religion is still "left exclusively to the state government." *Hale v. Everett*, 53 N.H. 9 (1868). In the entire 276-page opinion and dissent the court found no reference to the Fourteenth Amendment necessary. As the district court below noted, the only reference in the opinion of the United States Constitution contained the following quote from Justice Story's COMMENTARIES regarding the First Amendment:

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[37]N.C. CONST. art. VI, § 5 (1868).

[38]TENN. CONST. art. IX, §§ 2 & 1 (1843). *Cf. McDaniel v. Paty*, 435 U.S. 618 (1978). *See also Church of the Holy Trinity v. United States*, 143 U.S. 457, 468-70 (1892). Justice Frankfurter pointed out in *Bartkus v. Ill.*, 359 U.S. 121, 125 (1959), that the Constitutions of fifteen states ratifying the Fourteenth Amendment did not comply with "the *grand jury guarantee* of the Fifth Amendment, the *criminal jury guarantee* of the Sixth Amendment, and the *civil jury guarantee* of the Seventh Amendment" (emphasis added):

> [I]f the first eight amendments were being applied verbatim to the States, ten of the thirty ratifying States would have impliedly been imposing upon themselves constitutional requirements on vital issues of state policies contrary to those present in their own constitutions.

Bartkus v. Ill., 359 U.S. at 125.

> [T]he whole power over the subject of religion is *left exclusively to the State governments*, to be acted upon according to their own sense of justice and the State constitutions. . . .
>
> Probably at the time of the adoption of the constitution and of the amendment to it now under consideration, the general if not the universal sentiment in America was, that *Christianity ought to receive encouragement from the state*, so far as not incompatible with the private rights of conscience and the freedom of religious worship.[39]

Similarly, the Wisconsin Supreme Court rejected the argument that a state statute which permitted "a party to be put on trial for a felony merely upon an information, is in *violation of the Fourteenth Amendment to the Constitution of the United States.*" The unanimous court held:

> [T]he words "due process of law," in this [fourteenth] amendment, *do not mean and have not the effect to limit the power of the state governments* to prosecute for crimes by indictments, but these words do mean law in its regular course of administration according to the prescribed form and in accordance with the general rule for the protection of individual rights . . . [I]f the people of the state find it wise and expedient to abolish the grand jury and prosecute all crimes by informative [sic] *there is nothing in the 14th amendment to the constitution of the United States, which prevents them from doing so.*

Rowan v. State, 30 Wis. 129, 148 (1872) (emphasis added).[40]

G. The Blaine Amendment and Subsequent Congressional Debates Demonstrate that Representatives and Senators

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[39] *Hale v. Everett*, 53 N.H. at 124, quoting from 2 STORY'S COMMENTARIES §§ 1879 & 1874 (4th ed. 1873) (emphasis added) (used by the district court in *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1123-24). The opinion discussed whether the state court could restrain the wardens of the First Unitarian Society of Christians from permitting a heretical preacher from occupying the pulpit.

[40] *See also Weimer v. Bunbury*, 30 Mich. 201, 208 (1874); *Romero v. State*, 60 Conn. 92, 94 (1891); *State v. Hayes*, 127 Conn. 543, 581, 18 A.2d 895, 914 (1941); and *State v. Roberts*, 166 Ind. 585, 591, 77 N.E. 1093, 1094 (1906).

who Participated in the Debates on the Fourteenth Amendment Just Seven Years Earlier Did Not Believe that the Establishment Clause Thereby Applied to the States.

In 1875, Sen. Blaine of Maine introduced a constitutional amendment to prohibit states from establishing a religion. However, *not a single senator or representative objected* to the amendment on the grounds that the Fourteenth Amendment made such unnecessary, even though 23 members of Congress had been in the House or Senate when the Fourteenth Amendment was passed just seven years earlier, as noted by the district court below. *Jaffree v. Board of School Commissioners,* 554 F. Supp. at 1125-26. The district court below relied on a study of the debates on the amendment by F. William O'Brien entitled JUSTICE REED AND THE FIRST AMENDMENT:

> Congressman Banks, a member of the Thirty-ninth Congress, observed: "If the Constitution is amended so as to secure the object embraced in the principle part of this proposed amendment, it prohibits the States from exercising a power they now exercise." Senator Frelinghuysen of New Jersey urged the passage of the "House article," which "prohibits the States for the first time, from the establishment of religion, from prohibiting its free exercise." Senator Stevenson, in opposing the proposed amendment, referred to *Thomas Jefferson "Friend as he [Jefferson] was of religious freedom, he would never have consented that the States . . . should be degraded and that the Government of the United States, a government of limited authority, a mere agent of the States with prescribed powers, should undertake to take possession of their schools and of their religion* . . . [N]one of the legislators in 1875 thought the Fourteenth Amendment incorporated the religious provisions of the First.[41]

For these reasons, Appellant-Intervenors urge this Court to reject

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[41] F. O'BRIEN, JUSTICE REED AND THE FIRST AMENDMENT 116-17 (n.d.) (emphasis supplied by the district court). *See* 4 CONG. REC. 5191, 5561 (1876). *Accord,* Meyer, *The Blaine Amendment and the Bill of Rights,* 64 HARV. L. REV. 939, 945 (1951) (included in Brief of the Appellee-Intervenors to the Eleventh Circuit Court of Appeals as Appendix VII).

36 years of erroneous historical interpretation and return to the view held by this Court for three-quarters of our Constitutional history: that the Fourteenth Amendment does not apply the Establishment Clause to the states in view of its language, intent and history.

III.

Even if this Court Finds that It Has Jurisdiction Over Religious Establishment Practices in the States, Its Prior Interpretations Conflict With the Language, Intent, and History of the Establishment Clause. The Establishment Clause Did Not Prohibit Prayer and Bible Reading in Schools Under Federal Control.

A. The Framers of the Establishment Clause Intended that It Be Applied to Prohibit Only the Federal Government's Establishment of a National Church or Sect, Not to Prevent All Nondiscriminatory Support of Religion.

Relying on the exhaustive historical research of Professor Robert L. Cord in SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982)[42] and the testimony of Appellant's expert Professor James McClellan, the district court below found:

> The first amendment "in large part was a guarantee to the states which insured that the states would be able to continue whatever church-state relationship existed in 1791 . . . The drafters of the first amendment understood the first amendment to prohibit the federal government only from establishing a national religion. Anything short of the outright establishment of a national religion was not seen as violative of the first amendment.[43]

After a comprehensive examination of the debates and actions of Congress and the states, in a 302-page study which relies on hundreds of quotations from original source material, Professor Cord concludes that Congress intended that the "establishment of religion" was limited to the establishment of a national church and did not prohibit federal aid for the support of religions in general: "The facts simply do not accord with the hard separationist position;

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[42] *See supra* note 18.

[43] *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1115.

but they are perfectly consistent with a moderate separationism, under which the state may choose to use sectarian means to accomplish secular ends as long as it refrains from the assumption of ecclesiastical authority or sectarian partisanship."[44] He cites four specific reasons for rejecting the view that establishment of religion meant "aid[ing] all religions," as held by Justice Black in *Everson v. Board of Education*, 330 U.S. 1, 15 (1947):

> First, the resolutions of the State Constitutional Ratifying Conventions from Maryland, Virginia, New York, North Carolina, and Rhode Island, understood in their historical context, all urged a constitutional amendment prohibiting *a single national religious establishment.*
>
> Second, in response to these State Ratifying Convention's requests, James Madison introduced his original draft of the Establishment Clause which on its face is clearly designed to foreclose a national religion, *not religions.*
>
> Third, Madison's interpretation given to Roger Sherman during the House's August 15, 1789 debate as to what the House's Select Committee's Report meant (regarding its recommended prohibition "that no religion shall be established by law") indicates clearly that Madison believed Congress was being denied the power to "establish a national religion" *not religions.*
>
> Fourth, the final wording of the religious clauses of the First Amendment — "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof" — shows the intent to prevent a single and not some pluralistic national religious establishment.[45]

B. The Contemporaneous Passage by Early Congresses and the State Legislatures of Acts Benefiting All Religion in Public Education Indicate that Religious Activities, such as Prayer and Bible Reading in Schools, Were Never Viewed as an Establishment of Religion.

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[44]R. CORD, *supra* note 18, at xi, 11-12.

[45]*Id.* at 11 (emphasis in original, footnotes omitted).

The First Congress reenacted the Northwest Ordinance just eight days prior to a major debate on the Establishment Clause and 58 days prior to Congressional ratification of the First Amendment. It provided for government of the Northwest Territories and distribution of federal land with this requirement: "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[46]

As Professor McClellan asked: "[i]f setting up a school to encourage prayer is a violation of religious establishment, why did [the First Congress] adopt such a law?" (T. 548)

The view of Professors Cord and McClellan explains why Congress, the day after adopting the Establishment Clause, did not believe it was violating that clause when it passed a resolution calling on President Washington to set aside a day for observance of thanksgiving, fasting, and prayer. R. CORD, *supra* note 18 at 27-29. James Madison as a member of the House voted for this resolution and later as president issued four prayer proclamations himself. In light of the widespread practice of prayer and Bible reading in schools, children apparently participated in these days of prayer.[47]

Cord's view of the Establishment Clause explains why Congress could appoint a chaplain three days prior to its adoption of the First Amendment without believing that it was establishing a religion. Such federal aid of all religions is "simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh*, ___ U.S. at ___, 103 S. Ct. at 3336.[48]

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[46]Northwest Ordinance, art. III, 1 Stat. 52 (Aug. 7, 1789), quoted by Dr. McClellan at T.548. The Act creating the Mississippi and Alabama Territory provided that the people of the territory "shall be entitled to and enjoy all and singular rights, privileges and advantages granted to the people of the Territory of the United States northwest of the River Ohio." 1 Stat. 549 (Apr. 7, 1798).

[47]*See* W. SMALL, EARLY NEW ENGLAND SCHOOLS 300-04 (1969) and W. BURTON, THE DISTRICT SCHOOL AS IT WAS 55 (1928).

[48]Another Congressional resolution specified that "divine services" should be held in St. Paul's Chapel in the District of Columbia as a part of George Washington's inauguration in 1789 to be "performed by the Chaplain of Congress" following administration of the oath of office. P. STOKES & L. PFEFFER, CHURCH AND STATE IN THE UNITED STATES 87 (rev. ed. 1964).

President Jefferson, the author (in 1802) of the "separation of church and state" dictum, submitted a treaty to the Senate in 1803 that provided federal money "to be used to support a Catholic priest and to be used to build a church for the ministry of the Kaskaskia Indians." *Jaffree v. Board of School Commissioners,* 554 F. Supp at 1117. Professor Cord cites page after page of early Congressional enactments which provided federal land or funds "for the propagation of the Gospel" among the Indians through schools.[49]

Relying on the research of Professors Cord and McClellan, the district court held that Jefferson's "wall of separation" is to be correctly interpreted as erecting a wall "in regard to possible federal action such as a law establishing a national religion or prohibiting the free exercise of worship." *Jaffree v. Board of School Commissioners,* 554 F. Supp. at 1118. It did not limit the activities of churches and individuals in order to protect the state or federal governments.

In view of the language, intent, and history of the Establishment Clause and contemporaneous acts of the First Congress and subsequent Congresses, Appellant-Intervenors petition this Court to find that prayer and other religious activities, encouraged in schools supported by federal aid during the early Congressional period, are constitutional.

IV.

The Supremacy Clause and Stare Decisis Rules Require this Court to Overrule its Recent Prayer Decisions and to Sustain the Challenged Prayer Statutes and Activities.

A. The Supremacy Clause of the Constitution Mandates that the Supreme Court Give More Attention to the Constitu-

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[49]R. CORD, *supra* note 18, at 42-45, 62-79, and 261-70. State land was granted by statute for the support of religious schools in many of the states. II STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS AT THE END OF THE CENTURY: A HISTORY 260-326 (1902); VIII CONN. STATE RECORDS 100 (1795); LAWS OF THE STATE OF N.Y. PASSED AT THE 18TH SESS. OF LEGISLATURE ch. 75, 50-51, (Apr. 9, 1795); PA. STAT. AT LARGE (1791-1793) 71-73 ch. MDLVII; and 5 S.C. Stat. 357 (Dec. 21, 1799). *See also* C. ANTIEAU, A. DOWNEY, & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT — FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES 173-74 (1964).

tion Itself than to the Court's Prior Interpretations of It.

The Supremacy Clause of the Constitution states that "this Constitution [is] . . . the supreme law of the land . . . " U.S. CONST. art. VI, cl. 2. Justice Frankfurter, concurring in *Graves v. New York, ex rel. O'Keefe,* 306 U.S. 466, 491-92 (1939), stated this principle well: "[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."[50]

This Court in *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938) relied on "recent historical research by a competent scholar" in overruling almost 100 years of judicial assumption of power. *Id.* at 73. Where the Supreme Court has believed that it was in error, it has not hesitated to overrule itself: 27 times prior to 1938, 21 times in the next twelve years, and 12 times in the next decade.[51] Between 1960 and 1979 the Court overruled itself in no less than 47 constitutional cases.[52] Where recent but erroneous precedents are upheld by the courts in violation of the clear meaning of the Constitution, then the action of the courts is "as Mr. Justice Holmes said, 'an unconstitutional assumption of power by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.' " *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.,* 276 U.S. 518, 532-33 (1928), quoted in *Erie,* 304 U.S. at 79 (per Brandeis, J.).

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[50]A New York court seized on this principle in *Wuebker v. James,* 58 N.Y.S.2d 671, 677 (Schenectady Co. Ct. 1944): "Article 6 of the Federal Constitution . . . does not require an oath to support . . . any court decision."

[51]*See, e.g.,* footnoted cases in *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 407 n.2, 409 n.4 (1932) (Brandeis, J., dissenting, citing cases). Amicus Curiae Concerned Women for America Education & Legal Defense Foundation submitted a brief to the Eleventh Circuit Court of Appeals on the subject of stare decisis (included in its entirety in Brief of the Appellee-Intervenors to the Eleventh Circuit Court of Appeals as Appendix VIII).

[52]Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law,* 1980 WIS. L. REV. 467, 494-96. Justice Douglas noted that stare decisis has a limited place in deciding constitutional issues:

> A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that *it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it* . . .

Douglas, *Stare Decisis,* 49 COL. L. REV. 735, 736 (1949) (emphasis added).

B. The Supreme Court Has Consistently Looked to the Language, the Intent of the Adopting Congress and Ratifying State Legislatures, and the History of a Constitutional Amendment in Interpreting the Terms of a Constitutional Provision.

As the trial court noted, quoting *Hawaii v. Mankichi*, 190 U.S. 197, 212 (1903): "[t]he intention of the lawmaker is the law."[53] Chief Justice Burger in *Marsh v. Chambers*, held that "[h]istorical evidence sheds light not only on what the draftsmen *intended* the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress —their actions reveal their intent." *Marsh*, ___ U.S. at ___, 103 S. Ct. at 3344 (emphasis added). *Accord Wisconsin v. Pelican Insurance Co.*, 127 U.S. 265, 297 (1888).[54]

The Northwest Ordinance and other congressional acts relating to religious education, which were enacted by the First and other early Congresses close to the adoption of the First Amendment, provide a unique history which the Supreme Court must examine if it is to discover Congress' meaning in the Establishment Clause.

C. The Precedents of This Court for 156 Years Uniformly Held that Neither the First Nor the Fourteenth Amendment Prevents State Religious Establishments nor Applies All of the First Eight Amendments to the States. These Cases Should Be Followed in Upholding the Challenged Prayer Statutes and Activities.

Although this Court has held that its considered practice is "not to apply stare decisis as rigidly in constitutional as in non-constitutional cases," *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962), it is bound to examine what it previously held for almost three-fourths of our

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[53] *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1120. *See also Atkins v. Disintegrating Co.*, 85 U.S. (18 Wall.) 272, 301 (1873); *Jones v. N.Y. Guaranty & Indemnity Co.*, 101 U.S. 622 (1879); and *Whitney v. Wyman*, 101 U.S. 392 (1879).

[54] *See also Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922); *Frank v. Md.*, 359 U.S. 360, 370 (1959), *reh'g denied* 360 U.S. 914 (1959); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 327-28 (1936); *Meyers v. United States*, 272 U.S. 52, 175 (1926); and *Walz v. Tax Comm'n*, 397 U.S. 664, 686 (1970) (Brennan, J., concurring).

constitutional history.

This Court on numerous occasions refused to apply the first eight amendments to the states through the Fourteenth Amendment.[55] In *Adamson v. California*, 332 U.S. 46 (1947), Mr. Justice Frankfurter, concurring, summarized the state of incorporation:

> Between the incorporation of the Fourteenth Amendment into the Constitution and the beginning of the present membership of the Court — a period of *seventy years* — the scope of that Amendment was passed upon by *forty-three judges*. Of all of these judges, *only one, who may respectfully be called an eccentric exception, ever indicated the belief . . . that due process incorporated those eight Amendments as restrictions upon the power of the States* . . . [T]hey were also judges mindful of the relation of our federal system to a progressively democratic society and therefore *duly regardful of the scope of authority that was left to the States even after the Civil War*.[56]

D. The Present Supreme Court Must Overrule Its Prior Decisions and the Appellate Court Below Where Those Decisions Conflict with the True Intent of the Drafters of the Constitution.

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[55] *See Twitchell v. Pa.*, 74 U.S. (7 Wall.) 321 (1869); *Davidson v. New Orleans*, 96 U.S. 97 (1877); *Hurtado v. Cal.*, 110 U.S. 516 (1884); *In re Kemmler*, 136 U.S. 436 (1890); *Maxwell v. Dow*, 176 U.S. 581 (1900); *Twining v. N.J.*, 211 U.S. 78 (1908); *Palko v. Conn.*, 302 U.S. 319 (1937); *Prudential Ins. Co. of Am. v. Cheek*, 259 U.S. 530 (1922); and *Adamson v. Cal.*, 332 U.S. 46 (1947). *See also* Justice Harlan, concurring in *Griswold v. Conn.*, 381 U.S. 479, 500 (1965); *Gideon v. Wainwright*, 372 U.S. 335, 352 (1963); and *Lanza v. N.Y.*, 370 U.S. 139, 147 (1962); Justice Rehnquist, dissenting, in *Carter v. Ky.*, 450 U.S. 288, 309 (1981) and *Thomas v. Review Bd.*, 450 U.S. 707, 721 (1981); Justice Harlan, dissenting in *Poe v. Ullman*, 367 U.S. 497, 540 (1961) and *Roth v. United States*, 354 U.S. 476, 503 (1957); and Justice Jackson, dissenting in *Beauharnais v. Ill.*, 343 U.S. 250, 288 (1952). *See also Baron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) and *Permoli v. New Orleans*, 44 U.S. (3 How.) 589, 609-10 (1845), for the Court's view prior to adoption of the Fourteenth Amendment.

[56] *Adamson v. Cal.*, 332 U.S. at 62 (emphasis added). Mr. Justice Frankfurter relied upon Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* *supra* note 23, as a persuasive legal scholar.

The court of appeals below held that the Supreme Court has "carefully considered these arguments [as to application of the Fourteenth Amendment to the states and a broad definition of the Establishment Clause] and rejected them." *Jaffree v. Wallace*, 705 F.2d at 1530. However, in *Abington School District v. Schempp*, 374 U.S. 203, 217 (1963), the first case relied on by the appellate court, this Court acknowledges that "none of the parties . . . [had] questioned these basic conclusions of the Court . . . ," and the Court did not request briefs on the subject. The real history of the Establishment Clause did not have a day in court.

In *Engel v. Vitale*, 370 U.S. 421, 429-30 (1962), the Court failed to supply "any citation to authority" to support its proposition that the Establishment Clause applied to the states. *Jaffree v. Board of School Commissioners*, 554 F. Supp. at 1110.

Considerable evidence was presented to the trial court in this case which was not available to the Supreme Court when it passed upon the meaning of the Establishment Clause and its applicability to the states in *Everson*, *Engel*, and *Abington*:

(1) Extensive evidence on the erroneous application of the Establishment Clause (and the Bill of Rights) to the states through the Fourteenth Amendment.[57]

(2) An extensive study of the financial involvement of the federal government in sectarian educational projects in the early Constitutional period — projects which were approved by both Jefferson and Madison;[58] and

(3) Testimony showing how rivalry between the former colonies and fear of a national religious establishment caused the First Congress to prohibit the federal government from promoting a single religious sect or denomination.[59]

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[57] *See* R. BERGER, *supra* note 22, cited with approval by the court below, *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1122; and H. MEYER, *supra* note 23.

[58] R. CORD, *supra* note 18 (Defendant-Intervenor Ex. 14, excerpted in Brief of the Appellee-Intervenors to the Eleventh Circuit Court of Appeals at Appendix II).

[59] T. 530-32. The expert testimony of Professor James McClellan was expanded on by his article, *The Making and the Unmaking of the Establishment Clause*, *supra* note 36.

Conclusion

Engel, Abington, Everson and the cases that followed them have had a chilling effect on free speech and free exercise of religion by teachers and students in public schools since 1961. Can teachers express their views on religion or instruct their students in the religious values of our culture without violating the Establishment Clause?[60] Is the school board or teacher prohibited from including segments in the curriculum which are religious in nature, or must only non-theistic, secular values be taught?[61]

Will teachers or students who have a faith in God be in contempt of court if they pray silently or verbally in plain view of their classes? If so, one teacher testifed at trial that she will be forced to choose between receiving the benefit of her employment and her religious convictions.[62]

Are teachers now prohibited from discussing the meaning of Christmas, Thanksgiving, Easter, and other religious holidays? Are they barred from singing religious songs, an activity which the district court has now suppressed in part because of the complaint of Jaffree?

Questions as these are stifling academic freedom in American public schools until teachers cannot instruct in anything but secular or nontheistic values of our culture. Prior Court's interpretations of the Establishment Clause have created a hostility toward religion in public education that was expressly forbidden by the Court in *Abington,* 374 U.S. at 225. *See supra* notes 17 and 45.

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[60]Defendant-Intervenors' expert witnesses testified that education cannot be free of religion and that all values are religious. *See* testimony of Dr. D. James Kennedy (T. 635), Dr. R. J. Rushdoony (T. 322), and Dr. Norman Harper (T. 731).

[61]*See Stone v. Graham,* 449 U.S. 39, 40 (1980).

[62]*See* testimony of Karen Phillips. (T. 664) *Cf. Thomas v. Review Bd.,* 450 U.S. 707 (1981).

The 624 teachers, parents, and students who are Defendant-Intervenors petition this honorable Court to examine the historical evidence presented for the first time to the trial court below by the adversarial system and stop the present oppression of their rights of free speech and free exercise of religion by returning to the original intent of the Establishment Clause.

Respecfully submitted,

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APPENDICES

Constitutional and Statutory Provisions

United States Constitution:

Article VI, Section 2:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding."

Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment X:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes:

Northwest Ordinance, 1 Stat. 50, 52, art. III (Aug. 7, 1789):

> "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

ALA. CODE § 16-1-20.1 (1981):

> "At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in."

ALA. CODE § 16-1-20.2 (1982):

> "From henceforth, any teacher or professor in any public educational institution within the State of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may pray, *may lead willing students in prayer,* or may lead the willing students in the following prayer to God:
>
> Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, *in the sanctity of our homes* and in the classrooms of our schools *in the name of our Lord.* Amen."

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CONSOLIDATED CASES:

Civil Action No. 83-7046 and Civil Action No. 83-7047

ISHMAEL JAFFREE, et al.,

Plaintiffs-Appellants

v.

GEORGE C. WALLACE, et al.,

Defendants-Appellees

DOUGLAS T. SMITH, et al.,

Intervenors-Appellees

* * * * * * * * * * * * * *

ISHMAEL JAFFREE, et al.,

Plaintiffs-Appellants

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, et al.,

Defendants-Appellees

DOUGLAS T. SMITH, et al.,

Intervenors-Appellees

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Douglas T. Smith, et al., intervenors, appellees in the Court of Appeals above-named, hereby appeal to the Supreme Court of the United States from the judgment of the Court of Appeals reversing the District Court's dismissal of the complaints, originally entered in this section on May 12, 1983, with a Petition for Rehearing and Suggestion for Rehearing En Banc denied August 15, 1983.

This appeal is taken pursuant to 28 U.S.C. § 1254 (2).

/s/ Thomas O. Kotouc
Counsel for Douglas T. Smith
et al., Intervenors
Appellants in the Supreme Court

CERTIFICATE OF SERVICE

I hereby certify that I have, this date, served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States by first class U.S. Mail, upon counsel for all parties of record, known to the undersigned.

Done this 2nd day of November, 1983.

/s/ Thomas O. Kotouc
PARKER & KOTOUC
317 North Hull Street
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205/263-5543

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

Nos. 83-812
83-929

IN THE

Supreme Court Of The United States

October Term, 1983

GEORGE C. WALLACE, Governor, et al.,
Appellants,

DOUGLAS T. SMITH, et al.,
Intervenors-Appellants,

v.

ISHMAEL JAFFREE, et al.,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION TO AFFIRM

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Nos. 83-812
83-929

IN THE

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ISHMAEL JAFFREE, et al.,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment and decree of the United States Court of Appeals for the Eleventh Circuit be affirmed on the grounds that the questions are so insubstantial as not to warrant further argument.

STATEMENT

After several unsuccessful attempts to get Mobile County Public School Officials to stop sponsoring prayer exercises, the Appellee, Ishmael Jaffree, filed this action on behalf of his three minor children, seeking injunctive and declaratory relief. Included as defendants were three elementary school teachers. *Jaffree v. Board of School Commissioners*, 554 F.Supp. 1104 (S.D. Ala. 1983).

Upon learning of the action against the three teachers, Fob James, then Governor of Alabama, requested the state legislature to pass a prayer law, drafted by his son, to support the "three brave teachers in Mobile".[1] In response, the state legislature enacted Senate Bill 8, 1982, Ala. Acts 82-735, codified Ala. Code Section 16-1-20.2. (Cum. Supp. 1982).[2] This statute is commonly referred to as the "James Prayer Law".

In 1978, the Alabama state legislature enacted Ala. Code Section 16-1-20 which permitted teachers to announce a period of silence for meditation.[3] Appellees did not pursue

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[1]Vivian Cannon, Mobile Press Register, June 22, 1982.

[2]As enacted, Ala. Code Section 16-1-20.2 (Cum. Supp. 1982) provides:

> From henceforth, any teacher or professor in any public educational institution within the State of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may pray, may lead willing students in prayer, or may lead the willing students in the following prayer to God:
>
> > Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools in the name of our Lord. Amen.

[3]Ala. Code Section 16-1-20 (Cum. Supp. 1982) provides:

> At the commencement of the first class each day in the first through the sixth grades in all public schools, the teacher in charge of the room in which each such class is held shall announce that a period of silence, not to exceed one minute in duration, shall be observed for meditation, and during any such period silence shall be maintained and no activities engaged in.

a challenge to this statute. *Jaffree v. James,* 544 F.Supp. 727, 732 (S.D. Ala. 1982).

In 1981 the Alabama state legislature amended Ala. Code Section 16-1-20 to permit teachers "in all grades in all public schools" to offer "prayers" in addition to meditation during the school day. Ala. Code Section 16-1-20.1.[4] The sponsoring senator, Senator Holmes, testified that his purpose in sponsoring Section 16-1-20.1 "was to return voluntary prayer to the public schools." Id. at 731.

Appellees amended their complaint to enjoin and have declared unconstitutional both Ala. Code Section 16-1-20.2 and Section 16-1-20.1. In addition, appellees joined as party-defendants the Governor of Alabama and other state officials. R. at 92-100.

The district court severed Appellees' complaint into two actions; one involving teacher-sponsored specific prayer exercises, and the other relating to the statutorily authorized teacher-sponsored prayer exercises. R. at 282. Following the severance, the court enjoined the implementation of the prayer statutes.[5] After trial, the district court dismissed both actions and dissolved the injunction.[6] The basis of both dismissals was the failure to state a claim upon which relief could be granted. This ruling was premised upon the district court's finding that this Court had "erred in its reading of history." *Jaffree v. Board of School Commissioners, supra,* at 1128.

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[4]Ala. Code Section 16-1-20.1 (Cum. Supp. 1982) provides:

> At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation *or voluntary prayer,* and during any such period no other activities shall be engaged in. (Emphasis added).

[5]*Jaffree v. James, supra.*

[6]*Jaffree v. Board of School Commissioners, supra; Jaffree v. James,* 554 F.Supp. 1130 (S.D. Ala. 1983).

Following the Eleventh Circuit's denial of an emergency motion requesting a stay and injunction, Appellees requested Justice Powell to stay the trial court's order. Justice Powell granted the stay and reinstated the injunction pending disposition in the court of appeals. *Jaffree v. Board of School Commissioners,* U.S. 103 S.Ct. 842, (1983). The court of appeals reversed the dismissal of both actions and remanded the case with instructions for the district court to enjoin the statutes and teacher sponsored prayers. *Jaffree v. Wallace,* 705 F.2d 1526 (11th Cir. 1983).

The county school board's petition for rehearing and rehearing en banc was denied by the court of appeals with four judges dissenting only from the part of the panel's decision which held the "moment of silence" statute unconstitutional. *Jaffree v. Wallace,* 713 F.2d 614 (11th Cir. 1983).

Governor Wallace filed Notice of Appeal to this Court on Sept. 21, 1983.

ARGUMENT

A. Appellants' First Question is so Insubstantial as not to Warrant a Hearing on the Merits.[7]

The first question is:

> Whether a statute enacted for the purpose of returning prayer to the public schools, and which authorizes public school teachers to reserve a minute at the be-

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[7]In addition to Governor Wallace, over six hundred intervenors filed their notice of appeal. *Wallace v. Jaffree,* No. 83-929. In their jurisdictional statement they raise arguments substantially similar to those of the Governor. This Motion to Affirm is therefore intended to respond to questions raised in the Intervenors' Jurisdictional Statement. This motion will additionally address arguments advanced by the Solicitor General in his Brief for the United States as Amicus Curiae.

ginning of the school day for silent prayer or meditation is violative of the Establishment Clause.[8]

The State of Alabama, as have twenty-one other states,[9] has legislated a moment of silence so that public school children may silently pray. To-date, the Alabama State Legislature has not invaded the providence of the general population by regulating their silent prayers as well. This case may be considered as one of those "third class of cases—silly cases" to which Justice Rehnquist was referring in his dissent in *Larkin v. Grendel's Den, Inc.*, U.S. , 103 S.Ct. 505, 512 (1982).

Appellees will concede that because legislation is "silly", useless and unnecessary it does not, because of these reasons alone, become unconstitutional. However, when legislation such as Ala. Code Section 16-1-20.1 attempts to invade the providence of the people and regulate silent prayers it runs afoul of the Establishment Clause.

This case, better than most, demonstrates the need for, and continuing vitality of the three part test first articulated by this Court in *Waltz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970) and again in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This test, simply stated, requires that any law challenged on establishment grounds must meet each of the following criteria: (1) the law must

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[8]Though the statute (Ala. Code Section 16-1-20.1) refers to "voluntary prayer", the inclusion of the word "voluntary" is irrelevant. As discussed in Appellees' Brief in Opposition to Petition for a Writ of Certiorari, *Board of School Commissioners v. Jaffree*, No. 83-804, the fact that participation in a state sponsored religious activity is made voluntary will not free it from the strictures of the Establishment Clause.

The sponsorship and financial support of a church by a state will not pass muster under the Establishment Clause even if membership therein is strictly voluntary. As will be discussed infra, the Establishment Clause does not require coercion on the part of the state. *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963).

[9]See the listing provided in the Brief for the United States as Amicus Curiae at 6 note 5.

clearly reflect a secular purpose; (2) it must have a primary effect that neither advances nor inhibits religion; and (3) it must avoid excessive government entanglement with religion. *Lemon, supra* at 612-13. As will be discussed below, Alabama's silent prayer statute fails to meet all of these minimum standards.

The Solicitor General argues that the question presented is substantial because it raises the issue of "whether the Constitution prohibits neutral and non-coercive means of accommodating private religious practices in the public schools, and, by extension in other public contexts."[10] The Solicitor raises the spector that a summary affirmance by this Court will implicate a prohibition on "tax preferences for religious institutions, the allowance of religious holidays to federal employees and the enforcement of the religious accommodation requirements of Title VII of the Civil Rights Act of 1964."[11] The Solicitor over states his case. The issues raised in this case will in no way implicate the well settled areas of law referenced in the Solicitor's comment.

The gist of the Solicitor's argument in favor of the silence prayer statute is that it merely *accommodates* those students desiring to pray and "presents no threat to the values protected by the Establishment Clause. It evinces a 'benevolent neutrality' (citation omitted) in keeping with the libertarian spirit of both Religious Clauses."[12] The Solicitor's reliance on this Court's accommodation principle is misplaced.

This Court has been willing to blur the "wall of separation" to accommodate religion in certain contexts. The Court has permitted off-premises public school release time

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[10]Id. at 1.
[11]Id. at 1-2.
[12]Id. at 15.

programs.[13] The Court has permitted, in limited cases, states to provide financial aid to religious colleges.[14] This Court has also allowed, upon a free speech rational, the use of state university facilities for religious activities.[15]

This Court has been far less willing to accommodate religion in the public schools. Four years prior to the court's decision in *Zorach, supra,* this Court ruled in *McCollum v. Board of Education,* 333 U.S. 203 (1948) that for outside teachers to conduct sectarian classes on public school premises violates the Establishment Clause. *Zorach* and *McCollum* are reconciled on the basis of an on-premises/off-premises distinction (i.e.; any religious activity on school premises impermissibly promotes religion, while failure to allow off-premises religious activities demonstrates hostility towards religion).

The Appellants state, and Solicitors implies, that the Free Exercise Clause requires the state to accommodate those persons desiring to pray silently.[16] The fallacy of this argument is evident on its face. Appellants confuse issues when they assume that because the Free Exercise Clause bars the state from prohibiting individual prayers, the state can necessarily *promote* such prayers through group exercise. No matter how desirable this is as a matter of policy, the Establishment Clause prohibits this objective.

Turning to the tri-parte *Lemon* test, the Appellants suggest that "(a)t a minimum the Court could modify the current three-part test."[17] For thirteen years this Court has followed the *Waltz/Lemon* test where the enactment afforded a uniform benefit to all religions. No significant

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[13]*Zorach v. Clauson,* 343 U.S. 306 (1952).

[14]*Roemer v. Board of Pub. Works,* 426 U.S. 736 (1976); *Hunt v. McNair,* 413 U.S. 734 (1973); and *Tilton v. Richardson,* 403 U.S. 672 (1971).

[15]*Widmar v. Vincent,* 454 U.S. 263 (1981).

[16]See Appellants' Jurisdictional Statement at 11-15 and Brief for the United States as Amicus Curiae at 16.

[17]See Appellants' Jurisdictional Statement at 15.

problems in applying this test have emerged. The test continues to reflect current legal views and is especially suited to meet the demands of this case.

Purpose

The argument that Alabama's silent prayer statute is merely intended to "accommodate the interest of individuals of religious convictions in the public schools"[18] admits a non-secular purpose. Absent such an admission, it is clear that the purpose of Alabama's silent prayer statute was to establish a program of prayer in the public schools. The fact that Ala. Code Section 16-1-20.1 allows not only prayer, but meditation is not controlling. "It cannot be seriously argued and certainly cannot be assumed that school children can discern the nice distinctions concerning the meaning of 'meditation . . . and prayer'." *Duffy v. Las Cruces Pub. Schools,* 557 F.Supp. 1013, 1016 (D.N.M. 1983).

When the purpose of a statute cannot be discerned from its face the court should look to events surrounding the enactment of the statute. When so viewed, the non-secular purpose of Section 16-1-20.1 becomes transparent. In 1978, the Alabama legislature enacted Ala. Code Section 16-1-20. This statute permitted public school teachers in grades one through six to reserve, "at the commencement of the first class each day", a moment of silence for meditation. Arguably, this statute promoted the secular purpose of calming noisy students and providing for a period of personal introspection. Section 16-1-20 is still law and is not currently under challenge.

In 1981 the state legislature amended Section 16-1-20 in two material aspects. First, the period of silence was extended to "all grades in all public schools". Next, the activity permitted during this period of silence was augmented

[18]Brief for the United States as Amicus Curiae at 9.

to include "voluntary prayer". Ala. Code Section 16-1-20.1. Whatever conceivable secular purpose that may be claimed for the enactment of Section 16-1-20.1 was fully satisfied by its predecessor, Section 16-1-20.

While the legislative record surrounding Section 16-1-20.1 is sparce, it is undisputed that the *sole* sponsor of this statute had in mind the return of prayer to the public schools when he introduced the bill before the Alabama senate. Senator Holmes testified that in addition to returning prayer to the public schools, "(h)e intended to provide children the opportunity of sharing in their spiritual heritage of Alabama and of this country." *Jaffree v. James,* 544 F.Supp. 727 (S.D. Ala. 1982).[19]

Intent

Alabama's silent prayer statute's failure to satisfy the "purpose" part of the *Lemon* test renders it unconstitutional. *Stone v. Graham,* 449 U.S. 39 (1980). In addition to having a non-secular purpose, the statute also has a principal and primary effect of advancing religion.

As recently as last term in *Larkin v. Grendel's Den, Inc.,* U.S. 103 S.Ct. 505 (1982) this Court, with Chief Justice Burger speaking for the majority, recognized the potential for political conflict when governmental action gives even the appearance of governmental support for religion:

> . . . the mere *appearance* of a joint exercise of legislative authority by Church and State provides a significant *symbolic* benefit to religion in the minds of some by reason of the power conferred. It does not strain our prior holdings to say that the statute can be

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[19]Senator Holmes' comments were also reported in the Alabama Senate Journal at 921 (1981).

> seen as having a 'primary' and 'principal' effect of advancing religion. (emphasis added).
>
> Id. at 511

When government action is directed, as here, toward young impressionable children, it becomes even more important to closely scrutinize the "symbolic" effect of that action. Because of the coercive environment of public school classrooms, a stricter separation of religion is needed in the primary and secondary schools than in other government institutions.[20] The Solicitor General candidly admits that "(t)he special character of the public school classroom necessarily heightens sensitivity to possible problems under the Religion Clauses".[21]

There are a number of factors which gives appellants' silent prayer law the appearance of sponsoring religion. The statute prescribes that the meditation or prayer period be observed at the "commencement of the first class." This time period is the usual period reserved for school prayer. The length of time alloted is one minute. One minute is approximately the time it would take to recite the Lord's Prayer. The teacher is given the discretion to announce that meditation or prayer may be observed during the silent period. The state's compulsory education machinery is used to provide the audience. The audience is composed of young impressionable children.

As implemented, Alabama's silent prayer statute will encourage those teachers in favor of school prayer to make symbolic reverent gesticulations such as bowing their heads, folding their hands and otherwise appearing in a prayful posture. Conversely, a teacher who opposes school prayer

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[20]See *Widmar v. Vincent*, U.S. 102 S.Ct. 269, 276 Note 14 where this Court draws a distinction between university students (young adults) and younger students where the former is less impressionable and should be able to appreciate the University's policy of religious neutrality.

[21]Brief for the United States as Amicus Curiae at 14.

has it within her power to ensure that no students pray during the period of silence. For example, a teacher may announce that the silent period will be observed for only three seconds. This would technically comply with the statute. This teacher, of course, would be using the statute to "inhibit religion".

A teacher represents the established order in the classroom and commands respect not unlike a judge or mayor.[22] If the student perceives that the teacher intends her period of silence to be used for prayer, then the primary effect will be to advance region. The "law of imitation operates, and non-conformity is not an outstanding characteristic of children." *McCollum v. Board of Education,* 333 U.S. 203, 227 (1948).

As did the state in *Duffy v. Las Cruces Pub. Schools,* 557 F.Supp. 1013 (D. N.M. 1983), the state here has chosen to sponsor and actively involve itself in the matter of prayer. "A prayer, however, is undeniably religious and has, by its nature, both a religious purpose and effect (citation omitted). By authorizing a time for prayer in the classroom, the (appellants) have placed the imprimatur of the State on that religious activity". Id. at 1021.

Entanglement

This Court has acknowledged two distinct types of entanglements; administrative and political divisiveness. *Lemon v. Kurtzman, supra,* at 615-20, 623. The former involves government officials coming into close ongoing contact with the affairs of religious institutions. Id. at 623. It is the potential for political divisiveness generated by Alabama's silent prayer statute which causes the state to become excessively entangled with the affairs of religion.

[22]See R. Dawson, Political Socialization. 49-50 (2d ed. 1977).

This Court recognized in *McCollum v. Board of Education,* 333 U.S. 203, 231 that "(t)he public school is at once the symbol of our democracy and the most persuasive means for promoting our common destiny. In no other activity of the state is it more vital to keep out divisive forces than in its schools". The potential for political divisiveness is inherent in Alabama's silent prayer program. "(I)t is impossible for the state to promote *'all'* religions. Any activity necessarily has greater benefit to religions most suited to make use of it. As a result, not only the nonreligious, but also minority religions suffer because of their inability to enjoy the benefits of the state's religious programs."[23]

As stated above, some teachers will use the state sponsored moment of silence to advance their religious beliefs. Still others may use the time provided to inhibit or show hostility towards religious beliefs. To avoid such a result the teachers will have to be closely monitored by still other school officials. "(T)he very restrictions and surveillance necessary to ensure that teachers play a strictly non ideological role give rise to entanglements between church and state". *Lemon, supra* at 620-621.

B. Appellants' Second Question Raises an Issue that has been Clearly Resolved by this Court.

Appellants second question for review is:

> Whether Alabama's prayer law which authorizes public school teachers to lead students in audible prayers and which prescribes a prayer composed by the state violates the Establishment Clause.

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[23]Seide, Daily Moments of Silence in Public Schools; A Constitutional Analysis. 58 NYUL Rev. 364, 374-75 (1983). In Note 53 Seide cites examples of groups that would not benefit from the state's silent prayer program which includes Taoist, who do not believe in a theistic God, and Moslems, who express their faith in a manner not suited by a one minute of silence.

The enactment of Ala. Code Section 16-1-20.2 (James Prayer Law) was an effort on the part of the state to encourage a prayer program in its public schools.[24] As such, it fails each of the *Lemon* test standards examined in subpart A of this brief. As observed by the Eleventh Circuit, the statute is aggravated by the existence of a government composed prayer. *Jaffree v. Wallace, supra* at 1535.

The state composed prayer of Ala. Code Section 16-1-20.2 is governed by and on all fours with *Engel v. Vitale,* 370 U.S. 421 (1962).

> The petitioners contend among other things that the state laws requiring *or permitting* use of the Regents' prayer must be struck down as a violation of the Establishment Clause because that prayer was composed by government as a part of a governmental program to further religious beliefs. For this reason, petitioners argue, the State's use of the Regents' prayer in its public school system breaches the constitutional wall of separation between Church and State. We agree with that contention since we think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that *in this country it is no part of the business of government to compose prayers for any group of the American People to recite as a part of a religious program carried on by government.* (emphasis added).
>
> Id. at 425.

Appellees agree with Justice Powell that "(u)nless and until this Court reconsiders (*Engel,* it appears) to control this case. *Jaffree v. Board of School Commissioners,* U.S. 103 S.Ct. 842, 843 (1983).

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[24]The statute on its face states that its purpose is to give recognition "that the Lord God is one".

C. Appellants' Third and Final Question Raises Issues which have been Exhaustively Resolved by this Court.

Appellants' third question for review is:

> Whether this Court erred in its reading of history by interpreting the Constitution as prohibiting state sponsorship of public school prayers and by making the first eight amendments applicable to the states via the fourteenth amendment.

What the Intervenors, and to a lessor extent, the Appellants, are requesting of this Court is nothing short of remarkable. The Intervenors and Appellants seek to have this Court overturn over fifty five years of settled precedent and in the process reverse literally thousands of the Court's prior decisions.[25] The Intervenors are not only asking this Court to reverse prior Establishment Clause precedent by finding that the Clause only prohibit the "establishment of a national church", but, in addition, to find that none of the first eight amendments limit the states. The chaos which would result from such a ruling is self-evident.

This Court's Establishment Clause precedents have served the nation well. There is no need to re-read history based on the findings of two obscure historians and at the request of the Intervenors and Appellants. The purpose of the Establishment Clause and its applicability to the states is clear:

> The purpose of the First Amendment guarantees relating to religion were twofold: to foreclose *state* inter-

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[25]This Court in *Gitlow v. New York*, 268 U.S. 606 (1952) held for the first time that the First Amendment imposed limits upon the states by virtue of the operation of the Fourteenth Amendment. Since *Gitlow* the Court has incorporated into the Fourteenth Amendment and made applicable to the states the first eight amendments. That the First Amendment applies to the state is so well founded in the Court's established precedent, that the Court rarely states the basis for considering Establishment Clause issues. See *Marsh v. Chambers*, U.S. , 103 S.Ct. 3330 (1983).

ference with the practice of religious faiths, and to foreclose the establishment of a state religion familiar in other Eighteenth Century systems. Religion and government, each insulated from the other, could then coexist. (emphasis added).

Larkin v. Grendel's Den, Inc., U.S. 103 S.Ct. 505, 510 (1982).

CONCLUSION

Appellants and Intervenors have presented no questions that warrant further argument. Accordingly, we respectfully submit that the judgment of the Eleventh Circuit Court of Appeals should be affirmed.

RONNIE L. WILLIAMS
Counsel for Ishmael Jaffree, et al.
Appellees in the Supreme Court

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

GEORGE C. WALLACE, et al., Appellants,	*	NO.: 83-812
DOUGLAS T. SMITH, et al., Appellants,	*	NO.: 83-929
V.	*	
ISHMAEL JAFFREE, et al., Appellees.	*	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of APPELLEES' MOTION TO AFFIRM by mail this 21st day of February, 1984, to:

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SUPREME COURT OF THE UNITED STATES

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL.

(6) 83–812 *v.*

ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH ET AL.

(3) 83–929 *v.*

ISHMAEL JAFFREE ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Nos. 83–812 AND 83–929. Decided April 2, 1984

In these cases probable jurisdiction is noted limited to Question 1 in the jurisdictional statements. The cases are consolidated and a total of one hour is allotted for oral argument. The judgment with respect to the other issues presented by the appeals is affirmed.

JUSTICE STEVENS, concurring.

In his amended complaint in this case, appellee sought (1) a judgment holding two statutory provisions, Ala. Code § 16–1-20.1, Ala. Code § 16–1-20.2, and certain allegedly State sanctioned, though not statutorily sanctioned, school prayer practices invalid under the Establishment Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, and (2) an injunction against the enforcement of these statutory provisions and nonstatutory practices. The District Court dismissed the amended complaint. The Court of Appeals reversed the District Court's judgment in relevant part. It held the challenged statutory provisions and nonstatutory practices unconstitutional and ordered the District Court to enter an injunction. Appellants invoke this Court's appellate jurisdiction under 28 U. S. C. § 1254(2) regarding the Court of Appeals' judgments on the statutory provisions.

2 pp

As I understand it, the order this Court enters today is a holding that Ala. Code § 16–1-20.2 is invalid as repugnant to the Establishment Clause of the First Amendment, applicable to the States under the Fourteenth Amendment. Moreover, the Court's order also affirms the judgment of the Court of Appeals insofar as it directed the District Court to enjoin the appellants from enforcing Ala. Code § 16–1-20.2. The judgment of the Court of Appeals concerning the nonstatutory school prayer practices is not within the appellate jurisdiction of this Court and is challenged in a petition for a writ of certiorari in No. 83–804. The Court denies that petition.

The Court's order noting probable jurisdiction is thus limited to the judgment of the Court of Appeals concerning the constitutionality of Ala. Code § 16–1-20.1 (1982). Appellants frame the constitutional questions presented by that provision as follows:

> "Whether a state statute which permits, but does not require, teachers in public schools to observe up to a minute of non-activity for meditation or silent prayer has the predominant effect of advancing students' liberty of religion and of mind rather than any effect of establishing a religion." Juris. Statement, No. 83–812 i.
>
> "Does a moment of silence for individual silent 'prayer or meditation' at the beginning of each school day in a public school classroom violate the Establishment Clause of the First Amendment as interpreted by its language, framers' intent, and history?" Juris. Statement, No. 83–929 i.

On the understanding that the Court has limited argument to the question whether Ala. Code § 16–1-20.1 is invalid as repugnant to the Establishment Clause, applicable to the States under the Fourteenth Amendment, I join the Court's order.

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Nos. 83-812
83-929

In the Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE C. WALLACE, *et al.*,
Appellants,

DOUGLAS T. SMITH, *et al.*,
Intervenors-Appellants,

v.

ISHMAEL JAFFREE, *et al.*,
Appellee

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE, STATE OF CONNECTICUT

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Appellee

BRIEF OF AMICUS CURIAE, STATE OF CONNECTICUT

INTEREST OF AMICUS

In 1975, the Connecticut legislature enacted Conn. Gen. Stat. §10-16a (Rev. 1983) which now reads:

> Each local or regional board of education shall provide opportunity at the start of each school day to allow those students and teachers who wish to do so, the opportunity to observe such time in silent meditation.

The legislative history makes clear that in using the phrase "silent meditation" the legislature was "talking about a period of contemplation intended to express the author's, that is the person's own reflection on a matter that might be of inspiration, and that this inspiration need not be of a religious nature." (Senator DeNardis, 18 Conn. S. Proc. Pt. 5, 1975 Sess. p. 2450).

The purpose of the legislation was stated as "giving the opportunity in the schools to let them start the day with some sort of a meditation . . . something that would give the young people a chance to start their day off in some other way than they've been doing . . . that each one can sit there at his or her desk and think about their day, perhaps . . . maybe just to get their thoughts together . . . perhaps just do something." (Rep. Motto, 18 Conn. H. Proc. Pt. 8, 1975 Sess. p. 3745).

The Connecticut Statute does not require that the time period of silent meditation be teacher-led, or mandate that all students and teachers participate in meditation. The debate in the legislature thus indicates that this measure was the product of compromise, designed to go no further than permitted by applicable precedents of this Court. (Senator Owens, 18 Conn. S. Proc. Pt. 4, 1975 Sess. p. 1590).

This Court now has before it an Alabama statute calling for a period of silence for "meditation or voluntary prayer." Alabama Code §16-1-20.1. (Cum. Supp. 1982). Your Amicus writes to emphasize that there is no constitutional infirmity with a statute calling for a period of meditation alone. Even the Appellees, Jaffree, et al., so admit in the Motion to Affirm. *Motion to Affirm*, at 2, 3. The issue of school prayer is a divisive one, as became apparent when this issue arose in the Connecticut General Assembly. During the legislative process Connecticut enacted a compromise position which was able to encompass many valid points of view. The Connecticut resolution is suggested to this Court as one which will do no harm to any religious tradition or belief.

We respectfully ask this Court to find constitutional such statutes as Conn. Gen. Stat. §10-16a which recognize the valid role of voluntary meditation in the public school setting.[1]

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[1]The following states have statutes which mention "meditation or silent prayer": Alabama Code §16-1-20.1 (period of silence for meditation or voluntary prayer); Arkansas Stat. Ann. §80-

1607.1 (silent prayer or meditation on religious theme or moment of silent reflection on the anticipated activities of the day); Delaware Code Ann. 14 §4101 (2 or 3 minutes to participate in moral, philosophical, patriotic or religious activity, including voluntary prayer); Florida Stats. Ann. §233.062 (2 minutes for silent prayer or meditation); Georgia Code §20-2-1050 (silent prayer or meditation, as in Ark., *supra*); Illinois Rev. Stat. Ch. 122 ¶771 (silent prayer or meditation, as in Ark., *supra*); Indiana Code §20-10.1-7-11 (silent prayer or meditation, as in Ark., *supra*); Kansas Stat. Ann. §72.5308a (silent prayer or meditation as in Ark., *supra*); Louisiana Rev. Stat. Ann §17:2115 (meditation or prayer, not to be a religious exercise); Massachusetts Gen. Laws Ann. 71 §1A (a period of silence for meditation or prayer); Nevada Rev. Stat. §388.075 (period of silence for voluntary individual meditation, prayer or reflection); New Mexico Stat. Ann. §22-5-4.1 (period of silence for contemplation, meditation or prayer) (declared unconstitutional in *Duffy v. Las Cruces Public Schools*, 557 F.Supp. 1013 (D.N.Mex (1938)); North Dakota Cent. Code §15-47-30.1 (silent prayer or meditation, as in Ark., *supra*); Penn. Stat. Ann. tit. 24 §15. 1516.1 (silent prayer or meditation as in Ark., *supra*); Tennessee Code Ann. §49-1922 (one minute for meditation, prayer or personal beliefs) declared unconstitutional in *Beck v. McElrath*, 548 F.Supp. 1161 (D.Tenn.. 1982)); Virginia Code §22.1-203 (one minute for meditation or prayer).

The following states have meditation statutes only: Alabama Code §16-1-20 period of silence for meditation); Arizona Rev. Stat. Ann. §15-522 (supp. 1982) (period of silence for meditation); Connecticut Gen. Stat. §10-16a (opportunity for silent meditation); Maine Rev. Stat. Ann. tit. 20-A §4805 (period of silence for reflection or meditation); Maryland Ed. Code Ann. §7-104 (silent meditation for 1 minute at opening exercises); Michigan Stat. Ann. §15-41565 (opportunity for silent meditation); Ohio Rev. Code Ann. §3313.601 (period of time for meditation on moral, philosophical or patriotic theme); New Jersey Rev. Stat. §18A:36-4 (one minute of silence for quiet, contemplation, introspection) (declared unconstitutional, *May v. Cooperman*, 572 F.Supp. 1561 (D.N.J. 1983)); New York Ed. Law §3039-a (meditation on religious theme or activities of the day). Rhode Island Gen. L. §16-12-3.1 (one minute period of silence for meditation).

SUMMARY OF ARGUMENT

The Establishment Clause mandates that a state statute have a secular purpose and a primary effect that neither advances nor inhibits religion. A "meditation" statute, such as Connecticut's, has the valid secular purposes of calming "the tumult of the playground," teaching self-discipline, allowing for inspirational thought of any nature (religious or otherwise), and promoting respect for classroom teachers. The Connecticut Statute does not require all students and teachers to participate, it permits them to observe silent meditation voluntarily and does not require teacher-led meditation. It is a neutral enactment, having an important place in the school curriculum.

ARGUMENT

MEDITATION STATUTES ARE NOT A VIOLATION OF THE ESTABLISHMENT CLAUSE AND PROPERLY ACCOMMODATE ALL RELIGIOUS BELIEFS.

In voiding school-sponsored verbal prayer, *Engle v. Vitale*, 370 U.S. 421 (1962), Bible readings, *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) and more recently the posting of the Ten Commandments in school rooms, *Stone v. Graham*, 449 U.S. 39 (1981), this Court has declared that "to withstand the strictures of the Establishment Clause [the State Statute] must [have] a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Schempp, supra*, at 222.[2]

A. *The Statute Serves a Secular Purpose*

Applying the above-stated test to Connecticut's "opportunity to meditate" statute, there is no question that §10-16a has a secular legislative purpose. The debate on its enactment shows that the legislature wanted to give each student a chance to review in his mind the planned activities of the day and to afford him the opportunity to engage in inspirational thought of any nature, religious or otherwise. Taking place at the time of "opening exercises", the silent meditation would clearly correspond to Justice Brennan's conception in *Schempp*:

---

[2]The "excessive governmental entanglement" test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) is less applicable to school prayer than it is to funding of private institutions. *See* Drakeman, "Prayer in the Schools: Is New Jersey's Moment of Silence Law Constitutional," 35 Rut. L. Rev. 341 Note 100 (1983). In any event the fact that Connecticut's statute provides for voluntary meditation and is not teacher-led makes this factor one of minimal importance.

> I have previously suggested that Torasco and the Sunday Law Cases forbid the use of religious means to achieve secular ends where non-religious means will suffice. That principle is readily applied to these cases. It has not been shown that readings from the speeches and messages of great Americans, for example, or from the documents of our heritage of liberty, daily recitation of the Pledge of Allegiance, or *even the observance of a moment of reverent silence at the opening of class*, may not adequately serve the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any member of the community or the proper degree of separation between the spheres of religion and government. *Schempp, supra* at 280, 281. (emphasis added).[3]

Justice Brennan's words have served as justification to sustain silent meditation statutes in New Hampshire (*Opinion of the Justices*, 113 N.H. 297, 307 A.2d 558 (1973)) and

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[3]In a footnote Justice Brennan continued:

> Thomas Jefferson's insistence that where the judgments of young children "are not sufficiently matured for religious inquiries, their memories may here be stored with the most useful facts from Grecian, Roman, European and American history." 2 Writings of Thomas Jefferson (Memorial ed. 1903), 204, is relevant here. Recent proposals have explored the possibility of commencing the school day "with a quiet moment that would still the tumult of the playground and start a day of study," Editorial, Washington Post, June 28, 1962 §A, p. 22, col 2. See also, New York Times, August 30, 1962 §1, p. 18, col. 2.

Schempp, supra, at 281 (note 57).

Alabama (*Jaffree v. James*, 544 F.Supp. 727 (S.D. Ala. 1982) (§16-1-20 constitutional). In Massachusetts a three-Judge District Court has found that the "legislature could reasonably believe that students tend to learn greater self-discipline and respect for the authority of the teacher from a required moment of silence." *Gaines v. Anderson*, 421 F.Supp. 337, 342 (D. Mass. 1976) (holding the Massachusetts Statute constitutional).[4] *See also* L. Tribe, *American Constitutional Law* at 829: "Similarly, since a moment of silence is arguably non-religious, even a statute *requiring* observance of a brief period of silence or meditation at the opening of the school day would not violate the establishment clause." (emphasis added) The Connecticut Statute does not *require* individuals to so observe.

B. *The Statute Neither Advances Nor Inhibits Religion*

Given this secular purpose, it cannot be said that Connecticut's statute advances or inhibits religion. The silent meditation law recognized the "wholesome 'neutrality' " with

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[4]*Gaines* also finds the striking of the word "prayer" from the proposed statute and the substitution of "meditation" indicates a good faith effort by the state legislature to comply with the Court's holdings. *Id.* at 342. That is what happened in the Connecticut legislative process:

> Mr. President, speaking on behalf of the committee on conference, we attempted, during our deliberations to satisfy all the points of view and to retain in theory the original intent of Senator Fauliso [to provide for silent prayer]. We believe we have reached accord. We have accommodated all of those people who had some reservations about the propriety and indeed the constitutionality, and we have before you in LCO7755 the fruits of our labor . . . .

Senator Hannon, 18 Conn. S. Proc. Pt. 5, 1975 Sess. p. 2446.

which government must treat religion." *Schempp, supra* at 222. The act of meditation is not so associated with one religion as to advance only religious beliefs. *See also, Gaines, supra* at 342. As this Court declared in *Lynch v. Donnelly*, 52 U.S.L.W. 4317, 4321 (March 6, 1984): "Here, whatever benefit [there is] to one faith or religion or to all religions, is indirect, remote and incidental . . . ." *See also*, Choper, "Religion in the Public Schools: A Proposed Constitutional Standard" 47 Minn. L.Rev. 329, 371 (1963):

> Since each student could utilize this moment of silence for any purpose he saw fit, the activity may not be fairly characterized as solely religious, and since no student would really know the subject of his classmates' reflections, no one could in any way be compelled to alter his thoughts.

Recent state and federal cases invalidating state statutes have focused on the use of the word "prayer" in the legislation and have found a legislative intent to ignore this Court's precedents. *Opinion of the Justices*, 387 Mass. 1201, 44 N.E.2d 1159 (1982), rejected proposed legislation which called for "a period of voluntary *prayer* or meditation." In invalidating a Tennessee statute, the court in *Beck v. McElrath*, 548 F.Supp. 1161, 1163 (M.D. Tenn. 1982) declared:

> Defendants suggest that the statute merely provides for enforcement of *a moment of silence* in public schools. This approach begs the preeminent question, however. Plaintiffs do not challenge simply a moment of silence here; they challenge a moment of silence which, by legislative mandate in Tennessee, "shall be observed for meditation or prayer or personal beliefs."

> It may well be, as defendants contend, that a moment of silence in and of itself is nondiscriminatory and may serve a secular purpose in aid of the educative function. Certainly a statutory enactment is unnecessary to provide for a moment of silence. The court is unable to agree, however, that the statute reflects such a clearly secular purpose . . . . There were indications that certain legislators have concluded that prayer should be a routine part of a school day because a majority of their constituents support such a practice. (Emphasis added).

And in *Duffy v. Las Cruces Public Schools*, 557 F.Supp. 1013, 1015 (D.N.Mex. 1983), the statute was rejected ("period [of silence] for contemplation, meditation or prayer") because "the word 'prayer' is a clear indication of legislative purpose . . . disguis[ing] the religious nature of the bill."[5] The word "prayer" is specifically not employed in the Connecticut Statute.

The sole case to consider a "meditation only" statute is *May v. Cooperman*, 572 F.Supp. 1561 (D.N.J. 1983), *appeal docketed*, No. 83-5890 (3rd Cir. Dec 16, 1983). This statute, *see* note 1, *supra*, provides for a minute of silence for "quiet and private contemplation or introspection." The Court found that, irrespective of the language of the statute, the New Jersey legislature unambiguously intended "to mandate a

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[5]The Court below in the instant case invalidates Ala. Code §16-1-20.1 stating: "[W]e do not imply that simple meditation or silence is barred in the public schools; we hold that the State cannot participate in the advancement of religious activity through any guise, including teacher-led meditation." *Jaffree v. Wallace*, 705 F.2d 1526, 1536 (11th Cir. 1983).

period at the start of each school day when all students would have an opportunity to engage in prayer." *Id.*, at 1571. The law was only one of a series of eighteen such bills passed by the legislature to circumvent the *Engle* and *Schempp* holdings. *Id.*, at 1572. Connecticut's statute, calling for silent meditation did not arise from a legislative context of repeated attempts to authorize school prayer. Its intent is to authorize a time of voluntary, private meditation for those students and teachers who choose to use it.

CONCLUSION

In this case the Court should recognize that there is no constitutional infirmity in state statutes that provide for silent meditation.

Respectfully submitted,

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On Appeals from the United States Court of Appeals for the Eleventh Circuit

---

BRIEF AMICUS CURIAE OF THE CENTER FOR JUDICIAL STUDIES IN SUPPORT OF APPELLANTS

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BRIEF AMICUS CURIAE OF THE CENTER FOR JUDICIAL STUDIES IN SUPPORT OF APPELLANTS

INTEREST OF THE AMICUS CURIAE

The Center for Judicial Studies, Rt. 2, Box 93, Cumberland, VA 23040 (804) 492-4922 is a tax-exempt, public policy institution founded in 1982 for the purpose of promoting judicial and legal reform. It is the only educational and legal organization in the United States that focuses exclusively on the problem of judicial activism and seeks to confine the powers of the federal judiciary within the powers envisioned for that judiciary by the

framers of the Constitution and the amendments thereto, including especially the Fourteenth Amendment. The Director of the Center for Judicial Studies is Dr. James McClellan.

The Appeal in this case involves an application of rulings by the United States Supreme Court which interpret the Fourteenth Amendment so as to apply the provisions of the Bill of Rights directly against the States. The Center for Judicial Studies contends that those holdings of the Supreme Court are contrary to the intent of the Fourteenth Amendment and that they have caused an imbalance in federal-state relations which ought to be corrected. This appeal presents an unusual opportunity for a serious discussion of these issues which constitute the main interest of the Center for Judicial Studies.

SUMMARY OF ARGUMENT

1. The rulings of the Supreme Court of the United States on the subject hold that officially sanctioned, voluntary public school prayer is a violation of the Establishment Clause of the First Amendment, as that clause has been held to apply to the States through the Fourteenth Amendment. Those rulings, however, are erroneous because the Fourteenth Amendment was not intended to apply any provisions of the Bill of Rights against the States.

2. Even if the Fourteenth Amendment were intended to apply some provisions of the Bill of Rights against the States, it was not intended so to apply the Establishment Clause. The rulings of the Supreme Court of the United States which interpret the Fourteenth Amendment so as to apply the Establishment Clause and other provisions of the Bill of Rights to the States are based on an erroneous interpretation of the history and intent of the Fourteenth Amendment; those rulings should be reexamined and rejected on the ground that they are unconstitutional.

3. Even if the Supreme Court were correct in its interpretation that the Establishment Clause was made applicable to the states by the Fourteenth Amendment, officially sanctioned, voluntary public school prayer, including an officially sanctioned period of silence for meditation or voluntary prayer, is still not in violation of the Constitution of the United States. This is so because the Establishment Clause was not intended to prevent any government, whether national or State, from encouraging religion and morality through sanctioning voluntary prayer in public schools. The rulings of the Supreme Court which interpret the Establishment Clause to preclude such a law or practice are based on an erroneous interpretation of the history and intent of the Establishment Clause. In light of newly published research and newly discovered historical material, those rulings should be reexamined and rejected.

4. Officially sanctioned, voluntary public school prayer is an exercise of the power reserved by the States to encourage religion and morality. Since the exercise of that power is not forbidden by any provision of the Constitution of the United States, including the amendments thereto, such prayer is not in violation of that constitution.

ARGUMENT

I. The Fourteenth Amendment Was Not Intended to Apply any of the Provisions of the Bill of Rights Against the States.

A. *General Considerations.*

In the 1963 school prayer case, the Supreme Court stated that:

> ". . . this Court has decisively settled that the First Amendment's mandate that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" has been made wholly applicable to the States by the Fourteenth Amendment. Twenty-three years ago in *Cantwell v.*

> *Connecticut*, 310 U.S. 296, 303 . . . This Court, through Mr. Justice Roberts, said:
>
> > "The fundamental concept or liberty embodied in that [Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. . . ."
>
> In a series of cases since Cantwell the Court has repeatedly reaffirmed that doctrine, and we do so now. *Abington School District v. Schempp*, 374 U.S. 203, 215 (1963)

An examination of the legislative history and intent of the Fourteenth Amendment, however, demonstrates that the Court's interpretation of that amendment is incorrect. In a matter of such importance, it is appropriate to reverse an erroneous interpretation no matter for how long that error has been accepted by the Court. The legislative history of the Fourteenth Amendment demonstrates that the application by the Supreme Court of the Bill of Rights to the States fits Justice Holmes' description, in another context, of "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting). In his definitive analysis of that legislative history, Charles Fairman exhaustively analyzes the "mountain of evidence" from the Congressional debates, the State ratifying proceedings and other original sources in support of his conclusion that the framers and ratifiers of the Fourteenth Amendment did not intend to make the Bill of Rights applicable against the States. Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L.

Rev. 5, 134 (1949) He contrasts this "mountain of evidence" with "the few stones and pebbles that made up the theory that the Fourteenth Amendment incorporated Amendments I to VIII." Ibid. The following passage from Fairman effectively summarizes his conclusion:

> As one looks up from this protracted inquiry, certain broad reflections seem controlling. If Senator Howard's statement about Amendments I to VIII had really been accepted at the time, surely one would find it caught up and repeated in contemporary discussion. "Section I incorporates the Bill of Rights"—an intricate subject would have been compressed into a capsule. So pat a phrase would have been passed about. The Democratic opposition, if they had understood that any such object was in view, would have sought to turn it to their advantage in states whose practice would be disturbed. And yet one does not find the thought expressed—neither in newspaper editorials or campaign speeches so far as they have been examined, nor in the messages of governors. Lawyers would have urged the contention in the courts, and if need be carried their appeals to the Supreme Court. But this simply did not occur.
>
> The freedom that the states traditionally have exercised to develop their own systems for administering justice, repels any thought that the federal provisions on grand jury, criminal jury, and civil jury were fastened upon them in 1868. Congress would not have attempted such a thing, the country would not have stood for it, the legislatures would not have ratified. The electoral campaign of 1866 was fought over the proposed Amendment but the debates never took the turn of suggesting that ratification would involve major change in the administration of justice in the Northern States. Recall how the legislatures in many Northern States, obedient to the autumn mandate, had trooped to ratify the Amendment—even suspending rules, refusing to refer to committee, cutting off debate; surely all this haste was not to make Amendments V, VI, and VII the Constitution's rule for every state. As one pon-

> ders the matter, this consideration seems far more substantial than a few words uttered by Bingham and Howard in the debates of 1866—especially since we have found that their conduct denied their words. *Ibid*, at 137-38

According to Alexander Bickel, Fairman "conclusively disproved [Justice Hugo Black's contention that the Fourteenth Amendment incorporated the Bill of Rights], at least, such is the weight of opinion among disinterested observers." Bickel, The Least Dangerous Branch (1962), 102. And Raoul Berger more recently notes that "my study of the debates and the history of the period leads me fully to concur with Fairman. . . ." Berger, Government by Judiciary (1977), 156, n. 95. As Berger states, the effect of the Supreme Court's incorporation of the Bill of Rights into the Fourteenth Amendment is "to broaden the Fourteenth Amendment and curtail States' Rights beyond the wildest conceptions of the framers and ratifiers." Berger, Government by Judiciary (1977), 156, n. 95. "[E]ven activists," notes Berger, "now concur that the Framers did not intend such incorporation." Raoul Berger, Death Penalties: The Supreme Court's Obstacle Course (1982), 15, citing Michael Perry, Interpretivism, Freedom of Expression and Equal Protection, 42 Ohio St. L. J. 261 (1981)

Professor Stanley Morrison's analysis of the judicial interpretations of the Fourteenth Amendment supports the Fairman conclusion. He concludes that the effort "to read the Bill of Rights into the Fourteenth Amendment amounts simply to an effort to put into the Constitution what the framers failed to put there. No matter how desirable the results might be, it is of the essence of our system that the judges must stay within the bounds of their constitutional power. Nothing is more fundamental —even the Bill of Rights. To depart from this fundamental is, in Mr. Justice Black's own words, "to frustrate the great design of a written Constitution." Morrison, Does the Fourteenth Amendment Incorporate the

Bill of Rights?—The Judicial Interpretation, 2 Stan. L. Rev. 140, 173 (1949). Nor can it be soundly argued that the Fourteenth Amendment applied some, but not all, of the provisions of the first eight amendments against the states. This selective incorporation theory, as Raoul Berger notes in his most recent book, "contemplates piecemeal incorporation by the Court, a course to which Justice Black vehemently objected, although in the end, as he himself noted, 'the selective incorporation process' has 'already worked to make most of the Bill of Rights' protections applicable to the States.' It represented, in the words of Justice White, 'a new approach,' departing from the Court's long course and not purporting to rest on historical warrant. Some articles of the Bill of Rights, Justice Cardozo had explained, were 'brought within the Fourteenth Amendment by a process of absorption,' a process that 'had its source in the belief [whose?] that neither liberty nor justice would exist if they were sacrificed.' The 'specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, became valid as against the States.' Not the faintest trace of 'ordered liberty' is to be 'found' in the history of the Fourteenth; the 'absorption' manifestly is a judicial construct. In what remains the most searching study of 'selective incorporation', Louis Henkin wrote, 'Selective incorporation funds no support in the language of the amendment, or in the history of its adoption,' and it is truly more difficult to justify than Justice Black's position that the Bill of Rights was wholly incorporated." Raoul Berger, Death Penalties: the Supreme Courts' Obstacle Course (1982), 15-16, quoting from Louis Henkin, 'Selective Incorporation' in the Fourteenth Amendment, 73 Yale L. J. 74, 77 (1963)

It is not the purpose of this brief to review in detail the legislative history and subsequent understanding of the Fourteenth Amendment. A few observations, how-

ever, are appropriate with respect to certain aspects of that history and understanding.

B. *The Congressional Debates on the Fourteenth Amendment.*

Those who would apply the Bill of Rights against the States by incorporating the first eight amendments into the word "liberty" in the due process clause of the Fourteenth Amendment, place primary reliance, with respect to the Congressional debates, on statements by two leading figures, Representative John A. Bingham of Ohio and Senator Jacob M. Howard of Michigan. *Adamson v. California*, 332 U.S. 46, 68-123 (1947) (dissenting opinion of Justice Black); Horace Flack, The Adoption of the Fourteenth Amendment (1908), 81, 87. However, as Professor Fairman has demonstrated in his analysis of Bingham's statements in the House, Bingham was confused as to the allocation of power between Congress and the states that already existed in the Constitution. This was dramatically illustrated when he addressed the House in introducing an early version of what became the Fourteenth Amendment. That version would have given Congress power to secure to all citizens in each state all privileges and immunities of citizens in the several States and to secure to all persons in the States equal protection in the rights to life, liberty, and property. Bingham declared, incorrectly, that every provision of the proposed amendment was already in the Constitution excepting only the enforcement power his amendment would give to Congress. *Cong. Globe*, 39th Cong., 1st Sess. 813 (1865-66) But there was, of course, no provision then existing in the Constitution which obliged the States to secure "equal protection in the rights to life, liberty and property." "A careful reader will have remarked," observes Professor Fairman, that Bingham "held a singular opinion on the constitutional problem. The states had all along been bound to accord the 'privileges and immunities' of Article IV, Section 2, but Congress had no power

to compel obedience. The states had all along been bound to protect the rights of life, liberty, and property: the Fifth Amendment recognized them and forbade the United States Government to infringe them; but again, Congress had not been given power to compel the states to observe these rights. If a state officer or legislator participated in making or enforcing a state law which, had such action been in the federal system would have amounted to a denial of the rights of life, liberty, or property, that state officer or legislator thereby violated his oath to observe the Constitution of the United States! But he did it with impunity, because the Fathers had given Congress no power to interfere. This is a novel, and one may think a befuddled, construction of the Constitution." Fairman, at 25-26.

As Fairman and others have shown from the record of Congressional debates, Bingham's "befuddled" remarks lending support to the theory that the Bill of Rights should be applied to the States were not only confused and self-contradictory, but also they failed to reflect the clearly predominant thinking of the House of Representatives. See Fairman at 24-37; Berger at 140-47.

Senator Howard is hardly more reliable as a support for the incorporation thesis. On May 23, 1866, Senator Howard acted as spokesman for the joint committee in presenting the resolution which ultimately became the Fourteenth Amendment. *Cong. Globe*, 39th Cong., 1st Sess. 2765 (1865-66). Referring to the privileges and immunities protected by Article IV, Sec. 2, of the Constitution, Howard said, "To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution. . . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."

This isolated statement, however, must be discounted by the facts that:

(1) Senator Howard failed to distinguish between due process of law and the concept of privileges and immunities;

(2) he represented a minority, radical view on the joint committee and he presented the resolution for the committee only because Senator Fessenden, the chairman, was ill;

(3) Senator Howard's position was specifically contradicted by other Senators on the floor; and

(4) there is no evidence that Senator Howard's view was accepted by either the House or the Senate. Fairman, at 57-68; Berger, Government by Judiciary, at 147-51.

C. *State Legislative Debates on the Fourteenth Amendment.*

If the Fourteenth Amendment imposed upon the States, in 1868, the duty of complying with the protections of the Bill of Rights, it would have immediately required a change in the laws of any state, for example, that allowed an accused to be charged with an "infamous crime" upon information rather than upon "presentment or indictment of a Grand Jury" (Fifth Amendment); that permitted some criminal prosecutions to be tried without a full twelve-man jury (Sixth Amendment); that denied "the right of trial by jury" in any common law suit "where the value in controversy shall exceed twenty dollars" (Seventh Amendment). In *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), Chief Justice John Marshall, writing for a unanimous Court, reaffirmed that the Bill of Rights did not apply to the States. If the Fourteenth Amendment changed that, it would mean, for example, that the States were forever bound to the grand jury system unless they could re-amend the Constitution of the United States. Although the "legislatures, almost without exception, kept no record of debates, but only a

journal of motions and votes" Fairman at 82, Professor Fairman examined those journals and related background material and found no significant evidence of support for the application of the Bill of Rights to the States by the Fourteenth Amendment. Fairman at 81-132. When, for example, an Illinois state constitutional convention met in 1869-70, one of the hotly debated proposals was one to abolish the grand jury. Yet the supporters of the grand jury "never so much as suggested that the Fourteenth Amendment incorporated the federal Bill of Rights and thus had fastened the grand jury upon the several states." Fairman at 99.

D. *The Readmission of Seceded States.*

Space limitations prevent more than a passing comment upon the action of Congress in 1868 readmitting six Confederate states to the Union. Representative Bingham and Senator Howard strongly urged the enactment of the resolution readmitting the states. Bingham stipulated one condition: "that not one of the six states named in it shall come to political power save upon the condition that its Legislature shall in due form ratify the fourteenth article of amendment." *Cong. Globe*, 40th Cong., 2d Sess., 3094. Of the six states, the constitutions of Florida, South Carolina, Louisiana and Georgia did not fulfill the requirements of the Fifth and Sixth Amendments with respect to criminal prosecutions. Yet "no member of Congress had evinced the slightest interest in comparing the respective bills of rights with Amendments I to VIII—though as we have seen some marked disparities were to be observed." Fairman at 130. And Bingham himself declared: "The constitutions of these several States, in accordance with the spirit and letter of the Constitution of the United States as it stands amended by the act of the American people, secure equal political and civil rights and equal privileges to all citizens of the United States, native born and naturalized. . . . ." *Cong. Globe*, 40th Cong., 2d Sess. 2462 (1867-68)

E. *Contemporaneous Judicial Decisions.*

Several cases, decided shortly after the adoption of the Fourteenth Amendment, confirm that it was not intended to apply the Bill of Rights against the states. For example, in December, 1868, five months after the promulgation of the Fourteenth Amendment, the Supreme Judicial Court of New Hampshire quoted Story's Commentaries on the Constitution in support of its conclusion that, by the First Amendment, "the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice and the state constitutions." *Hale v. Everett*, 53 N.H. 1, 124 (1868). In *Twitchell v. Pa.*, 7 Wall, 321 (1869), the Supreme Court of the United States, less than a year after the adoption of the Fourteenth Amendment, followed *Barron v. Baltimore*, 32 U.S. (7 Peters) 243 (1833), in holding that the fifth and sixth amendments do not apply to the states. To a similar effect, a year later, was the decision in *Justices of the Supreme Court of New York v. U.S. ex rel. Murray*, 76 U.S. (9 Wall.) 274, 278 (1870), in which the Supreme Court stated:

> "Another argument mainly relied upon . . . is that the first ten amendments proposed by Congress, and adopted by the States, are limitations upon the powers of the Federal government, and not upon the States; and we are referred to the cases of *Barron v. The Mayor and City Council of Baltimore* (7 Peters, 243); *Lessee of Livingston v. Moore and Others* (Ib. 551); *Twitchell v. The Commonwealth* (7 Wallace, 321), as authorities for the position. This is admitted, and it follows that the Seventh Amendment could not be invoked in a state court to prohibit it from reexamining, on a writ or error, facts that had been tried by a jury in the court below."

As Justice Frankfurter commented with respect to these cases, "the Court accepted as settled that the Seventh Amendment did not apply to the States. Neither

case intimates that anyone even thought of proposing that these amendments had been newly brought to bear on the States by the Fourteenth. Yet the Fourteenth's formulation and adoption had been a subject of great interest, especially to lawyers and judges, only months prior to the decision of these cases. The significance of this contemporaneous understanding need not be labored." Frankfurter, Memorandum on "Incorporation of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, 78 Harv. L. Rev. 746, 750 (1965).

"On every question of construction," wrote Thomas Jefferson, "carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed." Thomas Jefferson letter to William Johnson in 1823, in Ford, The Writings of Thomas Jefferson, X, 231 (1899). From the foregoing analysis, it is as clear as anything could possibly be in constitutional interpretation that the Fourteenth Amendment was not intended to apply the Bill of Rights against the States.

II. Even if the Fourteenth Amendment Were Intended to Apply Some Provisions of the Bill of Rights Against the States, It Was Not Intended so to Apply the Establishment Clause of the First Amendment.

A. *The Nature of the Establishment Clause.*

The Supreme Court has interpreted the word "liberty" in the due process clause to include the First Amendment's protection against any "law respecting an establishment of religion." *Abington School District v. Schempp*, 374 U.S. 203 (1963). The Establishment Clause, however, differs from the other provisions of the first eight amendments of the Bill of Rights. Those other provisions, e.g., against unreasonable searches and seizures, self-incrimination, etc., are protections of specific personal liberties against infringement by government. In the initial understanding, they were protections only

against infringement by the government of the United States. Even if it were true that the Fourteenth Amendment was intended to protect those liberties against infringement by the states, it would be unsound to draw that conclusion with respect to the Establishment Clause. For, as will be noted in Part III of this brief, the Establishment Clause was not intended to prevent government from encouraging religion and morality by acknowledging God. Rather, it was primarily intended to exclude the federal government entirely from legislating in any direction on the subject of establishments of religion and to ensure that that subject would be exclusively and unrestrictedly within the competence of the state governments. As Edward S. Corwin described the intent of the Establishment Clause: "That is, Congress should not prescribe a national faith, a possibility which those states with establishments of their own—Massachusetts, New Hampshire, Connecticut, Maryland, and South Carolina —probably regarded with fully as much concern as those which had gotten rid of their establishments. . . . In short, the principal importance of the Amendment lay in the separation which it effected between the respective jurisdictions of State and nation regarding religion, rather than in its bearing on the question of the Separation of Church and State." Edward S. Corwin, The Supreme Court As National School Board, in A Constitution of Powers in a Secular State (1951), 102, 106.

It is unsound to equate this assurance of state jurisdiction over the matter of religious establishments with a protection of "liberty." For even if an establishment of religion were regarded as equivalent to a denial of "liberty," the Clause does not at all protect against establishments on the state level. "The Constitution," said the Supreme Court in 1845, "makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws. Nor is there any inhibition imposed by the constitution in this respect on the states." *Permoli v. First*

Municipality of New Orleans, 44 U.S. 588, 609 (1845); see also, *Hale v. Everett*, 53 N.H. 1, 124 (1868). As Corwin concludes, "the prohibition on the establishment of religion by Congress is not convertible into a similar prohibition on the States, under the authorization of the Fourteenth Amendment, unless the term "establishment of religion" be given an application which carries with it invasion of somebody's freedom of religion, that is, of "liberty." Corwin at 116. The Establishment Clause, in summary, was intended not as a protection of personal "liberty" but as a delineation of federal and state jurisdiction.

B. *The Blaine Amendment.*

Even if there were nothing else in the record, the history of the Blaine Amendment would establish conclusively that the Establishment Clause was not intended by the Fourteenth Amendment to be applied against the States. The last third of the nineteenth century saw heightened public interest in the role of religion in public education. This interest was reflected in the history of the Blaine Amendment. In 1875, President Ulysses S. Grant delivered an address to the Army of the Tennessee in which he cautioned against public support of sectarian schools and the intrusion into the public schools of "sectarian, pagan or atheistical dogmas." Anson Stokes, Church and State in the United States, II, 722 (1964). In his annual message to Congress that year, President Grant called for a Constitutional amendment along those lines. Stokes at 723. In accord with his request, the Blaine Amendment was introduced in the House of Representatives in 1875. 4 *Cong. Rec.*, 44th Cong., 205. As introduced in the House it read:

> No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands

> devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations. *4 Cong. Rec.*, 44th Cong., IV, 205.

The Amendment passed the House of Representatives by a two-thirds majority. 4 *Cong. Rec.*, 44th Cong., 5189-92. It was rewritten by the Senate Judiciary Committee and, as debated in the Senate, it read as follows:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any State. No public property and no public revenue of, nor any loan of credit by or under the authority of, the United States, or any State, Territory, District, or municipal corporation, shall be appropriated to or made or used for the support of any school, educational or other institution under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization, or denomination shall be taught. And no such particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit, and no such appropriation or loan of credit shall be made to any religious or anti-religious sect, organization, or denomination, or to promote its interests or tenets. This article shall not be construed to prohibit the reading of the Bible in any school or institution; and it shall not have the effect to impair rights or property already vested.
>
> Sec. 2. Congress shall have power, by appropriate legislation, to provide for the prevention and punishment of violations of this article. *Ibid.*, 5443

The Blaine Amendment was defeated in the Senate. But it was incorporated in the Republican Party's national platform of 1876 and, for a time, was a burning political issue. The impact of the issue, and the general

frame of the public mind during the last quarter of the nineteenth century and the first years of the twentieth, is indicated by the widespread incorporation of similar provisions by 29 states into their own contributions between 1877 and 1917. Carol Zollman, American Church Law (1933), 74-80. The Blaine Amendment itself was introduced in Congress twenty times between 1876 and 1929 but it never received the requisite two-thirds majorities and thus was never referred for ratification to the states. *Proposed Amendments to the Constitution*, H.R. Doc. No. 551 (7th Cong., 1st Sess.), 182; *see* Meyer, *The Blaine Amendment and the Bill of Rights*, 64 Harv. L. Rev. 939 (1951)

"It scarcely needs to be mentioned that the basic presumption underlying the 1876 resolution was that the States were not forbidden by the Federal Constitution to establish churches, to infringe religious liberty, or to give public funds for religious purposes." F. William O'Brien, The States and "No Establishment": Proposed Amendments to the Constitution Since 1798, 4 Washburn L.J. 183, 187 (1965). The Congress which considered the Blaine Amendment in 1875 and 1876 included twenty-three members of the Thirty-ninth Congress, which had submitted the Fourteenth Amendment to the States. See James McClellan, Joseph Story and the American Constitution (1971), at 154. "Not one of the several Representatives and Senators who spoke on the proposal even suggested that its provisions were implicit in the amendment ratified just seven years earlier. Congressman Banks, a member of the Thirty-ninth Congress, observed: 'If the Constitution is amended so as to secure the object embraced in the principal part of this proposed amendment, it prohibits the States from exercising a power they now exercise.' Senator Frelinghuysen of New Jersey urged the passage of the 'House article,' which 'prohibits the States for the first time, from the establishment of religion, from prohibiting its free exercise.' Senator Stevenson, in opposing the proposed amendment, referred to Thomas Jefferson: 'Friend as he [Jefferson]

was of religious freedom, he would never have consented that the States . . . should be degraded and that the Government of the United States, a Government of limited authority, a mere agent of the States with prescribed powers, should undertake to take possession of their schools and of their religion.' Remarks of Randolph, Christiancy, Kernan, Whyte, Bogy, Eaton, and Morton give confirmation to the belief that none of the legislators in 1875 thought the Fourteenth Amendment incorporated the religious provisions of the First." F. William O'Brien, Justice Reed and the First Amendment (1958), 116-17.

Representative Blaine himself, who had taken an active part in the debates in the 39th Congress on the Fourteenth Amendment, confirmed beyond any doubt the contemporary understanding that the Fourteenth Amendment did not apply the Establishment Clause to the States. In an "open" letter written by Blaine to a political figure in Ohio, which letter was published in the New York Times two weeks before he introduced his amendment in the House, Blaine said:

> The Public School agitation in your late campaign is liable to break out elsewhere. . . . [T]he only settlement that can be final is the complete victory for non-sectarian schools. . . . The First Amendment of the Constitution, the joint product of Jefferson and Madison, proposed in 1789, declared that "Congress shall make no law respecting an establishment of religion, nor prohibiting the free exercise thereof." At that time when the powers of the federal government were untried and undeveloped, the fear was that Congress might be a source of danger to perfect religious liberty, and hence all power was taken from it. At the same time, states were left free to do as they pleased in regard to "an establishment of religion," for the Tenth Amendment, proposed by that eminent jurist, Theophilus Parsons, and adopted contemporaneously with the First, declared that "All powers not delegated to the national government . . . are reserved to the State. . . ."

> A majority of people in any state in this Union can, therefore, if they desire it, have an established church—under which the minority can be taxed for the erection of church edifices which they never enter and for the support of creeds which they do not believe. This power was actually exercised in many states long after the adoption of the federal constitution, and although there may be no danger of its revival in the future, the possibility of it should not be permitted. . . .
>
> And in curing this constitutional defect, all possibility of hurtful agitation on the school question shall also be ended. Just let the old Jefferson-Madison amendment be added to the inhibitory clause in Section 10, Article 1 of the federal Constitution, viz: "No State shall make any law respecting an establishment of religion, nor prohibiting the free exercise thereof; and no money raised by taxation for the support of the public schools, or derived from any public fund therefor, shall ever be under the control of any religious sect, nor shall any money so raised ever be divided between religious sects or denominations."
>
> This, you will observe, does not interfere with any state from having just such a school system as the citizens may prefer, subject to the one single and simple restriction that the schools shall not be made the arena for sectarian controversy or theological disputation. This, it seems to me, would be comprehensive and conclusive, and would be fair alike to Protestant and Catholic, to Jew and Gentile, leaving the religious conscience of every man free and unmolested. New York Times, Nov. 29, 1875, p. 2; O'Brien, 4 Washburn L.J. at 188.

From the history of the Blaine Amendment, one can only conclude that the Establishment Clause was not applied against the States by the Fourteenth Amendment. That history confirms the other and overwhelming indications that none of the provisions of the Bill of Rights was so applied.

III. Even if the Fourteenth Amendment Were Intended to Apply the Establishment Clause Against the States, Officially Sanctioned, Voluntary Public School Prayer, Including a Period of Silence for Meditation or Voluntary Prayer, Is Still Not Unconstitutional Because the Establishment Clause Was Not Intended to Prevent any Government from Encouraging Religion and Morality Through Such Prayer.

A. *The Supreme Court's View of the Purpose of the Establishment Clause.*

The currently effective criteria used by the Supreme Court to determine the constitutionality of a state or federal statute with respect to the Establishment Clause were spelled out in *Lemon v. Kurtzman*, 403 U.S. 602 at 612-13:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion." *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970).

The basically controlling decisions of the Supreme Court on prayer in public schools are *Engel v. Vitale*, 370 U.S. 421 (1962), and *Abington School District v. Schempp*, 374 U.S. 203 (1963). See also, *Marsh v. Chambers*, 103 S. Ct. 1330 (1983); *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984). The Court in *Engel* cited no cases in support of its decision. However, in *Schempp*, the Supreme Court relied in substantial part upon the history of the original intent of the Establishment Clause as expounded in *Everson v. Board of Education*, 330 U.S. 1 (1947):

> . . . this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over an-

other. Almost 20 years ago in *Everson, supra* (330 U.S. at 15), the Court said that "[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." And Mr. Justice Jackson, dissenting, agreed:

"There is no answer to the proposition . . . that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense . . . This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity." *Id.* 330 U.S. at 20.

Further, Mr. Justice Rutledge, joined by Justices Frankfurter, Jackson and Burton, declared:

"The [First] Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." *Id.* 330 U.S. at 31, 32.

The same conclusion has been firmly maintained ever since that time, *see Illinois ex rel. McCollum, supra* (333 U.S. at pp. 210, 211); *McGowan v. Maryland, supra* (366 U.S. at 442, 443); *Torcaso v. Watkins, supra* (367 U.S. at 492, 493, 495), and we reaffirm it now.

While none of the parties to either of these cases has questioned these basic conclusions of the Court, both of which have been long established, recognized and consistently reaffirmed, *others continue to question their history, logic and efficacy. Such contentions, in the light of the consistent interpretation in*

cases of this Court, seem entirely untenable and of value only as academic exercises. Abington School District v. Schempp, 374 U.S. at 216-17 (Emphasis added).

B. *The Appropriateness of a Reexamination of the Supreme Court's View of the Purpose of the Establishment Clause.*

Although the Court, in this last quoted passage, dismissed further challenges to the Court's own interpretation of the history of the First Amendment as "entirely untenable and of value only as academic exercises," nevertheless, newly published historical research confirms that the Court's construction of the Establishment Clause involves, as Justice Holmes said on another subject," an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting). Significantly, the Supreme Court, in accord with the Holmes position, ruled in *Erie R. v. Tompkins*, U.S. 64 (1938), that the doctrine of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) was abandoned because, as Justice Brandeis wrote in the opinion of the Court, "the unconstitutionality of the course pursued has now been made clear and compels us to do so." 304 U.S. at 77-78. Moreover, "in applying the doctrine this Court and the lower courts have invaded rights which are reserved by the Constitution to the several States" 304 U.S. at 80. The Court in *Erie* relied in part upon "the more recent research of a competent scholar" (Charles Warren, New Light on the History of the Federal Judiciary Act of 1789 (1923), 37 Harv. L. Rev. 49, 51-52, 81-88, 108; cited in *Erie R. v. Tompkins*, 304 U.S. at 72-73), who examined the history of the Judiciary Act of 1789 and "established that the construction given to it by the Court was erroneous." 304 U.S. at 72.

Just as an earlier Court, relying on advanced historical research, reexamined and disapproved the doctrine of

Swift v. Tyson, so the Supreme Court should now re-examine its Establishment Clause doctrine in the light of new historical research and newly discovered historical material that demonstrates that doctrine to be founded on clearly erroneous historical interpretations which can only be described, generously, as fictional.

C. *Newly Published Research and Newly Discovered Historical Material Demonstrates that the Supreme Court's View of the Purpose of the Establishment Clause is Clearly Erroneous.*

The literature on the historical meaning of the Establishment Clause is voluminous and much of it was considered and analyzed by the Supreme Court in the *Everson* case in which the court defined the general outlines of current Establishment Clause doctrine; in *Schempp* which defined the application of that clause in the school prayer context; and in other cases. See, for example, *McCollum v. Board of Education*, 333 U.S. 203 (1948). It is not the purpose of this brief to analyze the historical material which was considered by the Court in those cases. The purpose, rather, is to invite the attention of this Court to significant new research, and newly discovered historical material which has come to light since the *Schempp* case was decided in 1963, which demonstrates that the Court's current interpretation of the Establishment Clause is based upon a misunderstanding of the history ar purpose of that clause.

Professor Mark deWolfe Howe, in The Garden and the Wilderness, writes:

> Where have my speculations taken me? They began with the insolent suggestion that the Supreme Court has gone astray in its interpretations of American history. They moved on to the assertion that among the most important purposes of the First Amendment was the advancement of the interests of religion. The de facto establishment so familiar in American life and American institutions was born of that evangelical purpose. Had the Supreme Court

> been willing to recognize that the eighteenth-century's theory of inalienable rights and its philosophy of federalism combined to make the evangelical elements in the first Amendment innocuous—innocuous even to Jeffersonians—the justices would not have been tempted to give a wholly Jeffersonian reading to the religious clauses of the First Amendment. Among the factors which led them to disregard—event to distort—the intellectual background of the First Amendment was the unfortunate conviction of the Court that the policies of freedom and equality enunciated in 1868 in the Fourteenth Amendment must be read back into the prohibitions of the First Amendment—the familiar process of incorporation carried out, as it were, in reverse. The consequence may be admirable law, but it is, I submit, distorted history. Howe, The Garden and the Wilderness (1965), 31.

In his book, Joseph Story and the American Constitution, Professor James McClellan analyzes much previously neglected historical material relating to the First Amendment, including the important sermon delivered by Reverend Jasper Adams, a cousin of John Quincy Adams, in 1833, to a convention of the Episcopal Church in South Carolina [The sermon was later published under the title, "The Relation of Christianity to Civil Government in the United States," Charleston, February 13, 1833, before the Convention of the Protestant Episcopal Church of the Diocese of South Carolina (Charleston, 1833); see McClellan, Joseph Story and the American Constitution (1971), 136, n. 79]. The sermon, writes Dr. McClellan, "deals with this very issue of the absolutist versus the no preference theories at both the state and federal levels and, in anticipation of the establishment cases delivered by the Supreme Court since 1947, offers an abundance of evidence to refute the notion that church-state relations in the Revolutionary period and in early nineteenth-century America ever followed the absolutist example offered by Jefferson and Madison." McClellan at 136.

The First Amendment, in its treatment of religion, according to Reverend Adams, "leaves the entire subject in the same situation in which it found it; and such was precisely the most suitable course. The people of the United States . . . have emphatically declared that Congress shall make no change in the religion of the country. This was too delicate and too important a subject to be entrusted to their guardianship. It is the duty of the Congress, then, to permit the Christian religion to remain in the same state in which it was, at the time when the Constitution was adopted. They have no commission to destroy or injure the religion of the country. Their laws ought to be consistent with its principles and usages. They may not rightfully enact any measure or sanction any practice calculated to diminish its moral influence, or to impair the respect in which it is held among the people." In conclusion, state Adams, it should be noted, that "From the first settlement of this country up to the present time, particular days have been set apart by public authority, to acknowledge the favour, to implore the blessing, or to deprecate the wrath of Almighty God. In our Conventions and Legislative Assemblies, daily Christian worship has been customarily observed. All business proceedings in our Legislative halls and Courts of Justice, have been suspended by the universal consent on Sunday. Christian ministers have customarily been employed to perform stated religious services in the Army and Navy of the United States. In administering oaths, the Bible, the standard of Christian truth is used, to give additional weight and solemnity to the transaction. A respectful observance of Sunday, which is peculiarily a Christian institution, is required by the laws of all the states. My conclusion, then is sustained by the documents which gave rise to our colonial settlements, by the records of our colonial history, by our Constitutions of government made during and since the Revolution, by the laws of the respective states, and finally by the uniform practice which has existed under them." See McClellan at 138-30.

Chief Justice John Marshall wrote to Adams, expressing a favorable reaction to Adams' exposition of his thesis that the First Amendment conferred no authority on the Government of the United States to interfere with such state practices. "The documents annexed to the sermon certainly go far in sustaining the proposition which it is your purpose to establish," wrote Marshall, and he continued:

> The American population is entirely Christian, & with us Christianity & Religion are identified. It would be strange indeed, if with such a people, our institutions did not presuppose Christianity, & did not often refer to it, & exhibit relations with it. Legislation on the subject is admitted to require great delicacy because freedom of conscience & respect for our religion both claim our most sincere regard. You have allowed their full influence to both. Letter of John Marshall to Jasper Adams, May 9, 1833, quoted in McClellan at 139.

The Jasper Adams sermon is significant because of the historical evidence he marshaled in support of his conclusion and because of the written comments on that sermon by Justice Marshall and Joseph Story, both of whom were favorable to it, and James Madison, who regarded it unfavorably. Yet the Adams sermon has not been discussed in any of the Establishment Clause opinions of the Supreme Court.

Dr. McClellan summarizes his conclusion as to the historical analysis which currently prevails in Supreme Court opinions:

> To comprehend the original understanding of separation of church and state, at least a perusal of the acts of the First Congress which debated and drafted the First Amendment, would seem in order; but the Vinson and Warren and Burger courts have made no such effort. As a result, state religious practices in the late eighteenth and early nineteenth centuries, as well as the intent of the framers and supporters of the Bill of Rights, have been almost entirely ig-

> nored. The Court has, in fact, confined its inquiry into the historical background of the establishment clause to religious persecutions in Europe and the Virginia struggle against the Anglican establishment; and it has interpreted the Virginia experience (through carefully selected statements of Madison and Jefferson, against which conflicting statements or practices can be found), to be that of the Congress of 1791, and of the American republic generally. McClellan, Joseph Story and the American Constitution (1971) 142.

More recently, in another word, Dr. McClellan examined the operation of the various forms of established churches which existed in nine of the colonies at the outbreak of the Revolution, and concluded that:

> A principal underlying purpose of the First Amendment was to prevent the national government from usurping the powers of the states over the subject of church-state relations, and to reaffirm the authority or right of each state to define, without federal intereference, the nature of those relations within its own boundaries. The establishment clause, applying only to the federal government, was calculated to prevent not only the establishment of a national church, but to safeguard and leave undisturbed existing relations between church and state at the state and local level. McClellan, "The Making and Unmaking of the Establishment Clause", in "A Blueprint for Judicial Reform," McGuigan and Rader, eds. (1981), 295, 319.

The most recent and most detailed refutation of the Court's interpretation of the history of the First Amendment is "Separation of Church and State: Historical Fact and Current Fiction," by Prof. Robert L. Cord of Northeastern University. This book features a point-by-point refutation of the interpretation of the Establishment Clause made by the court in *Everson*, in *McCollum*, in other Supreme Court cases and especially in the influential writing of Leo Pfeffer. See, for example, Pfeffer, Church, State, and Freedom (rev. ed.) (Beacon Press, 1967)

"Inasmuch as historical arguments were the only justification offered by the High Court in *Everson* and *McCollum*," writes Professor Cord:

> . . . and given that American historical fact does not adequately support the Court's conclusions, the constitutional theories regarding Church and State resulting from the *Everson-McCollum* decisions rest on nothing more than what Justice Jackson honestly described as the Court's "own prepossessions." For me, this form of judicial decision making is incompatible with the rule of law. That grand concept relies on a more dispassionate form of judicial decision making, based on an absence of judicial predilections, especially in historical research, if history is invoked as dictating the Court's conclusions about the constitutionality of a political act.
>
> The tremendous damage that the erroneous history and decision of the *Everson-McCollum* Cases have wrought on the legitimate interaction between religion and community is clearly evident since their status as the precedent setting cases interpreting the Establishment Clause is constantly invoked by federal and state courts on all jurisdictional levels in cases dealing with the American constitutional doctrine of separation of Church and State. Cord, Separation of Church and State (1982), 144-45.

Professor Cord believes that "[i]n most instances, the Court's decisions involving separation of Church and State are not in accord with American historical fact" [Cord at 239] and he summarizes the intent of the religion clauses of the First Amendment as folows:

> From the above documentation, I conclude that, regarding religion, the First Amendment was intended to accomplish three purposes. First, it was intended to prevent the establishment of a national church or religion, or the giving of any religious sect or denomination a preferred status. Second, it was designed to safeguard the right of freedom of conscience in religious beliefs against invasion solely by the National Government. Third, it was so con-

structed in order to allow the States, unimpeded, to deal with establishments and aid to religious institutions as they saw fit. There appears to be no historical evidence that the First Amendment was intended to preclude Federal governmental aid to religion when it was provided on a nondiscriminatory basis. Nor does there appear to be any historical evidence that the First Amendment was intended to provide an *absolute separation or independence* of religion and the national state. The actions of the early Congresses and Presidents, in fact, suggest quite the opposite. Cord, at 15 (emphasis in original).

D. *An Incident from the First Congress.*

It is not the purpose of this amicus curiae brief to review in detail the historical background of the First Amendment. There is, however, one incident which is so revealing as to the intent of the framers of that amendment that it deserves mention.

The officially sanctioned prayer involved in this case simply permits persons engaged in a governmental activity to pray if they choose to do so. To interpret the First Amendment so as to preclude such permission would surprise the members of the First Congress who framed and approved that amendment. On September 24, 45, and 26, 1789, the Senate and House of Representatives did two things: they approved the First Amendment and sent it to the States for ratification and they called upon the President to "recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a Constitution of government for their safety and happiness." *Annals of Congress*, I, 949.

It cannot be believed that Congress requested the President to recommend a public day of prayer and, at the same time, proposed a constitutional amendment intended to prohibit that very type of prayer. See discussion in Rice, The Supreme Court and Public Prayer

(1964), 48-49. Indeed, Representative Thomas Tucker, of South Carolina, objected that, "it is a business with which Congress have nothing to do; it is a religious matter and, as such, is proscribed to us. If a day of thanksgiving must take place; let it be done by the authority of the several States; they know best what reason their constituents have to be pleased with the establishment of this Constitution." *Annals of Congress*, I, 950, Sept. 25, 1789. Congress, however, passed the resolution. If the question of Congress' competence in religious matters had not been raised, it could possibly be said that it had never occured to the members and therefore that the action of Congress ought not to be conclusive on the point. When, however, the issue was squarely joined, the First Congress deliberately overrode objections which were similar to those raised today against officially sanctioned, voluntary public school prayer, and voted to offer prayer to God.

Since the exercise of the reserved power to acknowledge and honor God is not forbidden to the States by any provision of the Constitution of the United States, officially sanctioned, voluntary public school prayer is not in violation of that constitution.

CONCLUSION

For the reasons stated above, amicus urges this Court to reverse the judgment of the Court of Appeals.

Respectfully submitted,

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Nos. 83-812 and 83-929

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE C. WALLACE, Governor of the State of Alabama, *et al.*,
Appellants,

v.

ISHMAEL JAFFREE, *et al.*,
Appellees.

DOUGLAS T. SMITH, *et al.*,
Appellants,

v.

ISHMAEL JAFFREE, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF APPELLANTS DOUGLAS T. SMITH, ET AL.

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QUESTIONS PRESENTED

1. Does a moment of silence for individual silent "prayer or meditation" at the beginning of each school day in a public school classroom violate the Establishment Clause of the First Amendment as interpreted by its language, framers' intent, and history?

LIST OF ALL PARTIES

Undersigned counsel of record for Intervenors-Appellants certify that the following listed parties have an interest in the outcome of this case.

Ishmael Jaffree, Jamel Aakki Jaffree, Makeba Green and Chioke Saleem Jaffree, named plaintiffs herein.

The Board of School Commissioners of Mobile County, Alabama; the Mobile County School Board Commissioners, Dan C. Alexander, Dr. Norman Berger, Hiram Bosarge, Norman G. Cox, Ruth Drago and Dr. Robert Gilliard; Dr. Abe Hammons, Superintendent of the Board of Education of Mobile County; Mobile County School teachers, Julia Green, Charlene Boyd and Pixie Alexander, Mobile County School principals, Annie Bell Phillips, Betty Lee and Emma Reed.

Defendants-Intervenors: Bobby and Emily Cook, Thomas and Sibyll Bends, Linda Drashman, Mrs. Steve Cooper, Joanne DeBenedetto, Bill Flowers, Vonna Tuberville, Mrs. Ralph O. Kelly, Joel C. Kelley, Lamar Guyton, Mrs. Abbie D. Tamblyn, Joseph R. Thompson, Bill Norton, Wayne Ward, Faye R. Sellers, Billie Jack Mitchell, Sr., Glenn Wiley, Tom Jones, James M. Dodd, Jr., Judith R. Dodd, William Glen Byron, Bobby Schiferly, Mr. and Mrs. A. W. Lawrence, Eva Hendrix, Dorothy K. Chancy, Ed and Carol Lietz, Cindy Elliott, G. N. Burrows, Paul J. Reid, John V. Hendrix, Julia A. Reib, Mary Taylor, Rev. and Mrs. Joseph L. Garlington, R. Bruce Vandiver, Mrs. R. Bruce Vandiver, Mrs. R. F. Wallace, Mrs. Moya Wells, Mr. Larry Wells, Wanda Brooks, Jerry Brooks, Ronald Glaze, Myra Thompson, Betsy Miller, Barbara Williams, Jack Christensen, Donald E. Thompson, Sonja Thompson, Jacqueline R. Peters, Michael J. Puckett, A. Rodney Applegate, Jr., J. E. Solomon, Virginia Stonestreet, Marti Pulliam, Jimmy Jones, Marie Woodham, Susan S. Hahn, Tim McGraw, Charles R. Smith, Mr. and Mrs. Jefferson C. McGee, George E. Fisher, Chris Evans, Don Sissons, Georgia

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-812

GEORGE C. WALLACE, Governor of the State of Alabama, *et al.*,

Appellants,

v.

ISHMAEL JAFFREE, *et al.*,

Appellees.

No. 83-929

DOUGLAS T. SMITH, *et al.*,

Appellants,

v.

ISHMAEL JAFFREE, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF APPELLANTS DOUGLAS T. SMITH, ET AL.

OPINIONS BELOW

The Preliminary Injunction of the United States District Court, Southern District of Alabama, was issued and reported on August 9, 1982, in *Jaffree v. James*, 544 F. Supp. 727 (S.D. Ala. 1982) (reprinted in the Jurisdictional Statement Appendix of Governor George C. Wallace [hereinafter referred to as Wallace] No. 83-812 at JS 64d).[1] This Preliminary Injunction was later vacated by an Order of the court issued and

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[1] References to "JS ——" are to appropriate pages of the Appendix to the Jurisdictional Statement of Wallace No. 83-812.

reported on January 14, 1983, in *Jaffree v. James*, 554 F. Supp. 1130 (S.D. Ala. 1983). (JS 56d) The Memorandum Opinion was issued and reported on the same day in the companion case of *Jaffree v. Board of School Commissioners of Mobile County*, 554 F. Supp. 1104 (S.D. Ala. 1983). (JS 1d) The two cases were consolidated upon appeal, and Wallace was substituted for Governor Fob James. The Opinion of the United States Court of Appeals for the Eleventh Circuit, affirming in part, reversing in part, and remanding with directions, was issued on May 12, 1983, in *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983). (JS 1a) The per curiam decision of the court of appeals denying the Petition for Rehearing and Suggestion for Rehearing En Banc, with an accompanying dissent written by Judge Roney, was issued on August 15, 1983, in *Jaffree v. Wallace*, 713 F.2d 614 (11th Cir. 1983). (JS 1b) The district court then issued an order enforcing the order of the court of appeals and enjoining the statutes and activities there held to be unconstitutional, on October 14, 1983. (JS 62d)[2]

JURISDICTION

Jurisdiction of this Court, to review the final judgment of the court of appeals that held a state statute or an activity treated as a state statute unconstitutional, is conferred by 28 U.S.C. § 1254(2).

A Notice of Appeal by the Appellants Douglas T. Smith, et al. [hereinafter referred to as Smith] (the Defendant-Intervenors at the trial court) to the judgment of the court of appeals was filed on November 2, 1983 (reprinted in Appendix 3a to Jurisdictional Statement of Appellants Smith). Probable jurisdiction was noted by this Court on April 2, 1984, as to the constitutionality of a period of silence for meditation or voluntary prayer. ALA. CODE § 16-1-20.1 (1981).

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[2] References to the Appendix in this brief are designated by a number and the letter "a", such as "5a".

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Appendix to the Jurisdictional Statement of Appellants Smith contains in full the following provisions: article VI, clause 2 and the first and tenth amendments to the United States Constitution (at 1a); only the relevant portions of the fourteenth amendment of the United States Constitution (at 1a) and of the Northwest Ordinance of 1789 (at 2a); and ALA. CODE § 16-1-20.1 (1981) (at 2a).

STATEMENT OF THE CASE

Appellee, Ishmael Jaffree (hereinafter referred to as Jaffree), on behalf of his three minor children enrolled in the Mobile, Alabama public school system, brought this action against the Board of School Commissioners of Mobile County, Alabama, requesting a permanent injunction against (1) all activities designed to encourage a belief in religion and (2) all teaching from *all instructional materials* which furthers a belief in religion. (R. 8, 9)[3] Jaffree then amended his complaint to ask that ALA. CODE § 16-1-20.1 (1981), providing a one-minute period of silence at the beginning of the school day "for meditation or voluntary prayer", be declared unconstitutional. Governor Fob James was added as a named defendant. (R. 92-100)

The trial judge, Judge W. Brevard Hand, issued a preliminary injunction (JS 64d) against the enforcement of the statute. The court stated, however, that "[t]his Court will not by judicial fiat delineate what a teacher or student may do in regard to his personal religious benefits for these are matters of personal conscience."[4] (JS 75d)

Seventeen people (R. 252-57) were allowed to intervene as party defendants. (R. 704) Following a motion

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[3] "(R. ——)" will hereinafter designate the appropriate page of the Record on Appeal; "(T. ——)" will hereinafter designate the appropriate page of the Trial Transcript.

[4] *Jaffree v. James*, 544 F. Supp. at 733.

filed October 22, 1982, 607 additional teachers, parents and students were allowed to join the original seventeen and have since continued as Intervenors. (R. 424) Appellants Smith, through their counsel, actively participated in the November 1982 trial on the merits, by presenting five expert witnesses and three teachers, one parent, and one student as witnesses, as well as by cross-examination, oral arguments and the submission of briefs.

The district court on January 14, 1983, entered an order for want of jurisdiction, stating:

> This Courts' review of the relevant legislative history surrounding the adoption of both the first amendment and the fourteenth amendment, together with the plain language of those amendments, leaves no doubt that those amendments were not intended to forbid religious prayers in the schools which the states and their political subdivisions mandate . . . .[5]
>
> Because the establishment clause of the first amendment to the United States Constitution does not prohibit the state from establishing a religion, the prayers offered by the teachers in this case are not unconstitutional. Therefore, the Court holds that the complaint fails to state a claim for which relief could be granted.[6]

The plaintiff appealed to the Eleventh Circuit Court of Appeals (R. 522), which reversed the district court's dismissal of the case, holding that the one-minute period of silence for meditation or prayer was a violation of the establishment clause.[7] The court further held that the establishment clause prohibited "any government involvement with religion" (JS 8a) and that "the state cannot participate in the advancement of religious activities through any guise, including teacher-led meditation,"

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[5] *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1128 (JS 48d-49d).

[6] *Jaffree v. James*, 554 F. Supp. 1130 (JS 56d).

[7] *Jaffree v. Wallace*, 705 F.2d at 1533-36. ALA. CODE § 16-1-20.1 (1981).

(JS 18a) implying that teachers may not discuss any religious matters in public school.[8]

A dissent by four judges on the court of appeals to the denial of rehearing, written by Judge Roney, argued that the statute which provides for a moment of silence for meditation or permissive prayer, is neutral and "facially and operationally constitutional." [9] (JS 4b)

SUMMARY OF ARGUMENT

This case provides the Court with a unique opportunity to affirm the clear language of the Constitution, the intent of the Founding Fathers, and history of the contemporaneous period regarding the constitutionality of a moment of silence for permissive prayer or meditation. The *language* of the establishment clause does not forbid a moment of silence, and, as this Court has recently ruled, does not "require complete separation of church and state . . . ." *Lynch v. Donnelly*, 104 S.Ct. 1355, 1359 (1984).

The *framers' manifest intent* was to allow in governmental institutions the widespread practice of individual silent prayer and meditation, which was not seen as the establishment of a national church. The *contemporaneous history* shows many forms of permissible oral prayer—which a fortiori justifies individual silent prayer or meditation. The Northwest Ordinance, for example, passed 58 days prior to the establishment clause, provided federal land for schools which were encouraged to teach religion and morality.[10] Grants of land to the Alabama territory were similarly restricted as to use.[11]

The record contains numerous historical documents and treaties introduced as evidence for the trial court to pass upon, as well as the testimony of expert witnesses on the

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[8] *Jaffree v. Wallace*, 705 F.2d at 1531 and 1536.

[9] *Jaffree v. Wallace*, 713 F.2d at 616.

[10] Northwest Ordinance, ch. 8, art. III, 1 Stat. 50, 52 (1789).

[11] Mississippi Territory Act, ch. 28, § 6, 1 Stat. 549, 550 (1798).

history of the Constitution. Much of this material is newly discovered and was not available to this Court when it ruled in *Everson v. Board of Education*, 330 U.S. 1 (1947), *Engel v. Vitale*, 370 U.S. 421 (1962), and *Abington School District v. Schempp*, 374 U.S. 203 (1963). The evidence was presented in an adversarial context, with opportunity for attorneys and the court to cross-examine experts and their sources of evidence.[12] Further historical material makes clear that the establishment clause was never applied to the states by the fourteenth amendment.

To forbid individual silent prayer or meditation would be the governmental "hostility" and certainly "callous indifference" to religion that the establishment clause forbids. *Lynch v. Donnelly*, 104 S.Ct. at 1359; *Zorach v. Clauson*, 343 U.S. 306, 314-15 (1952). The precedents of this Court for the first 160 years of our history until *Everson*, and the primary precedents of this Court since *Everson*, uniformly require that it overrule the court

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[12] The Opinion of the court below relied heavily on the recent scholarship of Professor Robert L. Cord of Northwestern University in R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982) (introduced into evidence as Defendant-Intervenors' Exhibit 14 at T. 571-72), copies of which have been lodged with the Office of the Clerk for the convenience of this Court and excerpted in the Appendix to this brief at 28a-43a) on the language, intent and history of the establishment clause of the first amendment, and on Professor Raoul Berger of Harvard Law School in GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) on the language, intent, and history of the fourteenth amendment, as well as the scholarly testimony of James McClellan, former professor at Emory University and former Chief Counsel to the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary. Professor McClellan's study *The Making and the Unmaking of the Establishment Clause* in A BLUEPRINT FOR JUDICIAL REFORM (1981) [hereinafter cited as McClellan, *Establishment Clause*] and the chapter *Christianity and the Common Law* from JOSEPH STORY AND THE AMERICAN CONSTITUTION (1971) [hereinafter cited as MCCLELLAN, JOSEPH STORY] were introduced into evidence as Defendant-Intervenors' Exhibits 12 (T. 571-72) and 13 (T. 571-72), respectively.

of appeals' decision below and other federal court decisions questioning the constitutionality of silent prayer or meditation.

ARGUMENT

A MOMENT FOR INDIVIDUAL SILENT PRAYER OR MEDITATION AT THE BEGINNING OF EACH SCHOOL DAY IN PUBLIC SCHOOL CLASSROOMS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

The Alabama statute before this Court does not mandate that any particular religious or non-religious activity be allowed, but merely allows a teacher to set aside time for the class to silently engage in individual prayer or meditation. The statute does not require either religious or non-religious content for the moment of silence. Meditation may be theistic or nontheistic, accommodating "all faiths and all forms of religious expression" [13] and philosophic belief.

This Court has uniformly rejected the extreme approach to the establishment clause of an absolute wall of total separation between church and state. As stated by the Court in *Lynch v. Donnelly*, 104 S.Ct. at 1362, the tripart test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) is not exclusive and not always relevant. In *Marsh v. Chambers*, 103 S.Ct. 3330 (1983) and, to some extent, in *Larson v. Valente*, 456 U.S. 228 (1982), this Court did not employ the tripart test but instead employed the historical test.[14]

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[13] *Lynch v. Donnelly*, 104 S.Ct. at 1361, citing *Zorach v. Clauson*, 343 U.S. 306. "The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but *only* when it has concluded that there was *no question* that the statute or activity was motivated *wholly* by religious considerations." *Lynch v. Donnelly*, 104 S.Ct. at 1362. As is evident in the subsequent sections, the drafters of the establishment clause believed that the teaching of religion and practice of prayer in public schools had a secular purpose—good government and the betterment of mankind.

[14] For the effects of these decisions on subsequent lower court rulings *see, e.g., Katcoff v. Marsh*, 582 F. Supp. 463 (E.D.N.Y.

The historical test should be applied in this case to the moment of silence for permissive prayer or meditation in public schools, just as it was applied in *Marsh* to uphold the prayers offered by a state-paid chaplain to a state legislature. However, if the tripart test is applied, the primary effect and purpose of a moment of silence are constitutional under *Lynch* and *Marsh*, with no excessive entanglement.

A. The Establishment Clause Does Not Prohibit Individual Silent Prayer or Meditation in Public Schools, as Demonstrated by Its Judicial Construction, Intended Meaning, and Contemporaneous History.

This Court's construction of the establishment clause has consistently rejected the extreme approach of an absolute wall of total separation of church and state that would bar a moment for individual silent prayer or meditation. This Court recently has authorized alternatives to the tripart test, and has employed the historical test, which strongly supports the constitutionality of a moment of silence. The historical adoption of the Northwest Ordinance, by the same First Congress that adopted the establishment clause, and the historical permissibility of prayer in federal public schools and in other governmental institutions argue strongly for the constitutionality of a moment of silence. As discussed in Section B, *infra*, the language and intended meaning of the establishment clause similarly does not in any way prohibit a moment for individual silent prayer or meditation.

1. *Supreme Court Construction Rejecting the Extreme Approach of an Absolute Wall of Total Separation of Church and State.*

This Court, in its most recent pronouncement on the establishment clause, held:

> The concept of a "wall" of separation is a useful figure of speech probably deriving from views of

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1984) following *Marsh v. Chambers* in applying the historical test to the Army chaplaincy.

> Thomas Jefferson. The metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it. But the metaphor itself is *not a wholly accurate description* of the practical aspects of the relationship that in fact exists between church and state.
>
> . . . "It has never been thought either possible or desirable to enforce a regime of total separation. . . ." *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 760, 93 S.Ct. 2955, 2958, 37 L. Ed. 2d 948 (1973). *Nor does the Constitution require complete separation of church and state*; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. *See e.g., Zorach v. Clauson*, 343 U.S. 306, 314, 315, 72 S.Ct. 679, 684, 96 L. Ed. 954 (1952); *McCollum v. Board of Education*, 333 U.S. 203, 211, 68 S.Ct. 461, 465, 92 L. Ed. 649 (1948). . . .
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> . . . .
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> This history may help explain why the Court consistently has *declined to take a rigid, absolutist view* of the Establishment Clause. We have refused "to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective *as illuminated by history*." *Walz v. Tax Commission*, 397 U.S. 664, 671, 90 S.Ct. 1409, 1412, 25 L. Ed. 2d 697 (1970) (Emphasis added). In our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court.

Lynch v. Donnelly, 104 S.Ct. at 1359-1361 (emphasis added, footnotes omitted).[15]

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[15] The Court has often relied on its 1878 adoption of the phrase "wall of separation" in *Reynolds v. United States*, 98 U.S. 145, 163-65 (1878). The poor scholarship employed in that decision is evidenced by the fact that the Court (1) did not review the debates to find the intent of Congress and the ratifying state legis-

Similarly, this Court held that its establishment clause decisions "do not call for total separation of church and state," and that the necessary partial separation "far from being a 'wall,' is a blurred, indistinct, and variable barrier," in the very decision that laid down the tripart test. *Lemon v. Kurtzman*, 403 U.S. at 614, *quoted in Lynch v. Donnelly*, 104 S.Ct. at 1362. It warned that the "metaphor of a 'wall' or impassible barrier between Church and State, taken too literally, may mislead constitutional analysis. . . ." *Gillette v. United States*, 401 U.S. 437, 450 (1971). This Court noted that the "First amendment, however, does not say that in every and all respects there shall be a separation of Church and State. . . ." *Zorach v. Clauson*, 343 U.S. at 312, *quoted in Walz v. Tax Commission*, 397 U.S. at 669. Also, the Supreme Court recently sustained the constitutionality of spoken group prayer—not just a moment for permissive silent individual prayer or meditation—in *Marsh v. Chambers*, 103 S.Ct. 3330.

As a result, this Court has permitted a number of activities in public schools and in other governmental institutions that would contravene an extreme position of an absolute wall of total separation of church and state. Some examples were recounted in *Lynch v. Donnelly*:

> There is an unbroken history of official acknowledgment by all three branches of government of a role of religion in American life from at least 1789. Seldom in our opinions was this more affirmatively

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latures; (2) did not look to contemporaneous acts of Congress to find its intent; (3) relied on Madison's writing about and for another event, his *Memorial and Remonstrance*; and (4) looked to Jefferson's 1802 "wall of separation" letter, while noting that he was absent as minister to France during the drafting, debate and adoption of the first amendment. The irony of *Reynolds*, however, is that the Court correctly used the contemporaneous act method to find Virginia's legislative intent for its anti-polygamy statute, passed subsequent to its act establishing religious freedom. This failure to use the contemporaneous act approach for the first amendment as well has caused many of the Court's apparent inconsistencies in interpreting the establishment clause.

expressed than in Justice Douglas' opinion for the Court validating a program allowing release of public school students from classes to attend off-campus religious exercises. Rejecting a claim that the program violated the Establishment Clause, the Court asserted pointedly:

> "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson supra*, 343 U.S. at 313, 72 S.Ct., at 684.

See also *Abington School District v. Schempp*, 374 U.S. 203, 213, 83 S.Ct. 1560, 1566, 10 L. Ed. 2d 844 (1963).

Our history is replete with *official references to the value and invocation of Divine guidance* in deliberations and pronouncements of the Founding Fathers and contemporary leaders. Beginning in the early colonial period long before Independence, a day of Thanksgiving was celebrated as a religious holiday to *give thanks* for the bounties of Nature as gifts from God. President Washington and his successors proclaimed Thanksgiving, with all its religious overtones, a day of national celebration and Congress made it a National Holiday more than a century ago. Ch. 167, 16 Stat. 168 (1870). That holiday has not lost its theme of expressing thanks for Divine aid any more than has Christmas lost its religious significance.

Executive Orders and other official announcements of Presidents and of the Congress have proclaimed both Christmas and Thanksgiving National Holidays in religious terms. And, by Acts of Congress, it has long been the practice that federal employees are released from duties on these National Holidays, while being paid from the same public revenues that provide the compensation of the Chaplains of the Senate and the House and the military services. See J. Res. 5, 23 Stat. 516 (1885). Thus, it is clear that Government has long recognized—indeed it has subsidized—holidays with religious significance.

Other examples of reference to our religious heritage are found in the statutorily prescribed *national*

> *motto* "In God We Trust," 36 U.S.C. § 186, which Congress and the President mandated for our currency, see 31 U.S.C. § 324, and in the language "One nation under God," as part of the Pledge of Allegiance to the American flag. That pledge is recited by thousands of public school children—and adults—every year.
>
> *Art galleries* supported by public revenues display religious paintings of the 15th and 16th centuries, predominantly inspired by one religious faith. . . .
>
> There are countless other illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage. Congress has directed the President to proclaim a *National Day of Prayer* each year "on which [day] the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals." 36 U.S.C. § 169h. Our Presidents have repeatedly issued such Proclamations. Presidential Proclamations and messages have also issued to commemorate Jewish Heritage Week, Proclamation No. 4844, 46 Fed. Reg. 25,077 (1981), and the Jewish High Holy Days, 17 Weekly Comp. Pres. Doc. 1058 (Sept. 27, 1981). One cannot look at even this brief resume without finding that our history is pervaded by expressions of religious beliefs such as are found in *Zorach*, *supra*. Equally pervasive is the evidence of accommodation of all faiths and all forms of religious expression, and hostility toward none. Through this accommodation, as Justice Douglas observed, governmental action has "follow[ed] the best of our traditions" and "respect[ed] the religious nature of our people." *Id.*, 343 U.S. at 314, 72 S.Ct., at 684.

Lynch v. Donnelly, 104 S.Ct. at 1360-61 (emphasis added, footnotes omitted).

A moment for individual silent prayer or meditation was sustained by a three-judge district court panel in *Gaines v. Anderson*, 421 F.Supp. 337 (D. Mass. 1976), applying this Court's nonabsolute approach to the establishment clause. (Several other courts have struck down

similar statutes, often employing an erroneous absolute approach to the establishment clause.[16]) The court in *Gaines* held:

> The requirements of the First Amendment do not implicate hostility to religion or indifference toward religious groups; they do not import a preference for those who believe in no religion, or demand primary devotion to the secular.
>
> The 1973 amendment is framed in the disjunctive, and the statute as amended permits meditation or prayer without mandating the one or the other. Thus, the effect of the amended statute is to accommodate students who desire to use the minute of silence for prayer or religious meditation, and also other students who prefer to reflect upon secular matters.

Id. at 343. That decision embodies the proper constitutional analysis for this case.

2. *Supreme Court Authorization of Alternatives to the Tripart Test and Use of the Historical Test.*

This Court has explicitly noted that the tripart test (laid down in *Lemon*) is not the exclusive test to be used in establishment clause cases. It held in *Lynch*:

> But, we have repeatedly emphasized our *unwillingness to be confined to any single test or criterion in this sensitive area. See e.g. Tilton v. Richardson*, 403 U.S. 672, 677-678 (1971); *Nyquist, supra*, 413 U.S., at 773. In two cases, the Court did *not even apply the Lemon "test."* We did not, for example, consider that analysis relevant in *Marsh, supra*. Nor did we find *Lemon* useful in *Larson v. Valente*, 456 U.S. 228 (1982), where there was substantial evidence of overt discrimination against a particular church.

Lynch v. Donnelly, 104 S.Ct. at 1362 (emphasis added). This Court has made similar statements in *Mueller v.*

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[16] *Duffy v. Las Cruces Pub. Schools*, 557 F. Supp. 1013 (D.N.M. 1983); *May v. Copperman*, 572 F. Supp. 1561 (D.N.J. 1983); *Beck v. McElrath*, 548 F. Supp. 1161 (M.D. Tenn. 1982).

Allen, 103 S. Ct. 3062, 3066 (1983), and *Hunt v. McNair*, 413 U.S. 734, 741 (1973).

The Supreme Court recently used the historical test instead of the tripart test in *Marsh v. Chambers*:

> The Court's interpretation of the Establishment Clause has comported with what history reveals was the *contemporaneous understanding* of its guarantees. . . . In the very week that Congress approved the Establishment Clause as a part of the Bill of Rights for submission to the states, it enacted legislation providing for paid chaplains for the House and Senate. In *Marsh v. Chambers*, —— U.S. ——, 103 S.Ct. 3330, 77 L. Ed. 2d 1019 (1983), we noted that seventeen Members of that First Congress had been Delegates to the Constitutional Convention where freedom of speech, press and religion and antagonism toward an established church were subjects of frequent discussion. We saw no conflict with the Establishment Clause when Nebraska employed members of the clergy as official Legislative Chaplains to give opening prayers at sessions of the state legislature. *Id.*, at ——, 103 S.Ct., at 3336.
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> The interpretation of the Establishment Clause by Congress in 1789 takes on special significance in light of the Court's emphasis that the First Congress "was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the *greatest weight in the interpretation* of that fundamental instrument," *Myers v. United States*, 272 U.S. 52, 174-75, 47 S.Ct. 21, 45, 71 L.Ed. 160 (1926).
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> . . . We have refused "to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as *illuminated by history*." *Walz v. Tax Commission*, 397 U.S. 664, 671, 90 S.Ct. 1409, 1412, 25 L. Ed. 2d 697 (1970).

Lynch v. Donnelly, 104 S.Ct. at 1359, 1361 (emphasis added). That historical test leads inexorably to the constitutionality of a moment for individual silent prayer or meditation, as the remainder of this brief argues.

3. *Contemporaneous History of Passage of the Northwest Ordinance by the First Congress.*

The Northwest Ordinance, enacted by the very Congress that adopted the first amendment, provides:

> *Religion, morality,* and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

Ch. 8, art. 3, 1 Stat. 50, 52 (Aug. 7, 1789) (emphasis added). (Appendix to the Jurisdictional Statement of Appellants Smith at 2a.)

Justice Douglas, concurring in *Engel v. Vitale*, 370 U.S. at 443, noted that "[r]eligion was *once* deemed to be a function of the public school system" (quoting the Northwest Ordinance set out above).[17] However, the Supreme Court has never examined Congress' contemporaneous passage of the Ordinance to see what light it sheds on the meaning of the establishment clause.

On July 10, 1787, a committee consisting of James Madison of Virginia, Nathan Dane of Massachusetts, and three other members of the Continental Congress reported a resolution authorizing a contract for surveying and sale of federal lands northwest of the Ohio River.[18] Lot No. 16 in each Township was given perpetually for the purpose of "*public education*" (as set out in the Ordinance of May 20, 1785), and Lot No. 29 in each Township was given perpetually for "the *purposes of religion.*" [19]

On July 13, 1787, Congress specified the use to be made of the land set aside for public education. It passed the Northwest Ordinance which provided: "*Religion, Morality*

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[17] (Emphasis added). The Ordinance was also referred to in *Jones v. Opelika*, 316 U.S. 584, 622 (1942); *Meyer v. Neb.*, 262 U.S. 390, 400 (1922); and *Andrus v. Utah*, 446 U.S. 500, 522 n. 3 (1980) (Powell, J., dissenting).

[18] 32 J. OF THE CONTINENTAL CONG. 311 (1787).

[19] *Id.* at 312 (emphasis added); Ordinance of May 20, 1785, art. 3, 28 *id.* at 375, 378, dealing with grants of land to public education. *See Andrus v. Utah*, 446 U.S. at 522-23.

and knowledge being necessary to good government and the happiness of mankind, Schools and the means of education *shall forever be encouraged.*" [20]

The Ordinance was drafted by Nathan Dane of Massachusetts, who wanted Eastern politics to be extended to the new territories and especially to Ohio, since many of its settlers had emigrated there from New England.[21] The Ordinance is a deliberate rejection of the philosophy of Thomas Jefferson, who had led the fight against tax support of religious teachers in 1785.[22]

The Ordinance follows the language of the Massachusetts and New Hampshire constitutions of 1780 and 1784, respectively. These required the local towns to appropriate tax money for the "support and maintenance of public Protestant teachers of piety, religion and morality" who would provide "public instruction in morality and religion." [23]

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[20] Northwest Ordinance, art. 3, 32 J. OF THE CONTINENTAL CONG. 334, 340 (1787) (emphasis added).

[21] Letter from Nathan Dane to Rufus King (Aug. 12, 1787), *reprinted in* 8 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 636 (E. Burnett ed. 1936).

[22] F. PHILBRICK, THE LAWS OF ILLINOIS TERRITORY 1809-1818 cccxxiv-cccxxv (1950).

[23] Massachusetts, the first colony to pass a public school law in 1647 requiring each township to appoint an individual to teach children the "knowledge of the Scriptures," provided by its constitution of 1780:

> As the happiness of a people, and the good order and preservation of civil government, essentially depend upon *piety, religion and morality*; and as these cannot be generally diffused through a community but by the institution of public worship of God, and of *public instructions in piety*, . . . the legislature shall from time to time *authorize and require*, the several towns . . . to make suitable provision at their own expense, for the institution of public worship of God, and for the *support and maintenance of public protestant teachers of piety, religion, and morality* . . . .

MASS. CONST. of 1780, Pt. I, art. III (emphasis added).

The New Hampshire constitution of 1784 also required "*public instruction in morality and religion*" and empowered "the legis-

When the First Congress assembled, Rep. James Madison, on June 8, 1789, reworked the proposed constitutional amendments from the states and submitted his version of the establishment and free exercise clauses to Congress for its consideration. His proposal stated: "nor shall *any national religion* be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed." [24]

On July 13, 1789, the House constituted itself a committee of the whole to debate the disposition on lands in the Northwest Territory.[25] In the meantime (on July 21, 1789), after sitting idle for a month and a half, Madison's proposals for constitutional amendments, along with those of the states, were submitted to a select committee of which he was a member.[26] The same day the Northwest Ordinance had its first reading in the Senate.[27] A week later (on July 28, 1789), the select committee submitted the following version of the establishment clause to the

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lature to authorize . . . the several towns . . . to make adequate provision at their own expense for the *support and maintenance of public protestant teachers of piety, religion and morality.*" N.H. CONST. of 1784, art. VI (emphasis added). The rationale for this was that "morality and piety, rightly grounded on evangelical principles, will give the best and greatest security to government . . . ." *Id.*

Georgia, which had established the Episcopal Church in 1784, also recognized the importance of religion in education, granting 20,000 acres in each county for a collegiate seminary of learning for this reason: "And whereas the encouragement of *religion* and learning is an object of great importance to any community, and must tend to the prosperity, happiness, and advantage of the same . . ." Act of Feb. 25, 1784, WATKINS DIGEST 293 (1800) (emphasis added).

[24] 1 ANNALS OF CONG. 434-35 (J. Gales ed. 1789) (emphasis added).

[25] *Id.* at 646 (J. Gales ed. 1834).

[26] *Id.* at 660, 665 (J. Gales ed. 1789).

[27] *Id.* at 52 (July 21, 1789) (J. Gales ed. 1834).

House: "No religion shall be established by law, nor shall the equal rights of conscience be infringed." [28]

Then on August 7, 1789, Congress re-enacted the Northwest Ordinance, which provided in Articles I and III:

> No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his *mode of worship* or religious sentiments in the said territory.
>
> . . . .
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> *Religion, morality,* and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education *shall forever be encouraged.*[29]

The fact that Congress re-enacted the Northwest Ordinance in 1789, 58 days prior to its adopting the establishment clause in final form, indicates that Congress gave its tacit approval to Nathan Dane's plan to extend governmental support of religious teaching in public schools in the Northwest Territories, and that the First Congress did not view that as the establishment of a religion.[30] (T. 548) Moreover, Justice Douglas' statement in *Engel* about the religious function of the public school system is correct, a function which in 1789 was not seen as a violation of the establishment clause. *Engel v. Vitale*, 370 U.S. at 443.

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[28] *Id.* (J. Gales ed. 1789) at 729. *See* C. ANTIEAU, A. DOWNEY & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSE 123-42 (1964) [hereinafter cited as ANTIEAU, DOWNEY & ROBERTS], referred to favorably by Chief Justice Burger in *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 668 & 675 n. 3 (1970), for a detailed account of the debates and related newspaper accounts and letters.

[29] Northwest Ordinance, ch. 8, arts. I & III, 1 Stat. 50, 52 (1789) (emphasis added).

[30] The Ordinance also contradicts Justice Douglas' belief in *McGowan v. Md.*, 366 U.S. 420, 563 (1961) (dissenting opinion) that the establishment clause requires that "if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government."

According to Chief Justice Burger in *Marsh v. Chambers*, "historical evidence sheds light not only on what the draftsmen *intended* the Establishment Clause to mean, but also on how they thought that Clause applied to the *practice authorized* by the First Congress—their actions reveal their intent." 103 S.Ct. at 3334 (emphasis added).[31]

This legislative history clearly demonstrates that the First Congress saw no conflict between the establishment clause and encouragement that religion be taught and prayers be given in the public schools in the Northwest Territory created by grants of federal land. Nor did it believe that a child would be molested in his mode of worship or religious sentiments (Article I of the Ordinance) if he were compelled to study religion in school. Instead, Congress believed that religion and schools in which religion and morality were taught were necessary to good government and the happiness of mankind. President Washington shared this belief.[32] For the men who drafted the first amendment, advancing religion and religious teaching fulfilled a vital secular purpose, establishment of good government.[33]

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[31] *Accord, Wis. v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888); *Boyd v. United States*, 116 U.S. 616, 623 (1886); *see also United States v. Villamonte-Marquez*, 103 S. Ct. 2573, 2582 (1983); *United States v. Ramsey*, 431 U.S. 606, 616-17 (1977); *Walz v. Tax Comm'n.*, 397 U.S. at 686 (Brennan, J., concurring); *Frank v. Md.*, 359 U.S. 360, 370 (1959), *reh'g denied*, 360 U.S. 914 (1959); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 327-28 (1936); *Myers v. United States*, 272 U.S. at 174-75, quoted with approval in *Lynch v. Donnelly*, 104 S.Ct. at 1359; *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

[32] *See* testimony of James McClellan (T. 548). President Washington in his Farewell Address of 1796 expressed the same conviction: "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." 5 W. IRVING, LIFE OF GEORGE WASHINGTON 343 (1860).

[33] The Northwest Ordinance shows that religious teaching may fulfill a secular end without violation of the establishment clause. As this Court held in *Lynch v. Donnelly*: "The Court has invalidated legislation or governmental action on the ground that a

4. *Contemporaneous History of Prayer in Federal Public Schools.*

When the First Congress encouraged the teaching of religion in the schools of the Northwest Territory, it intended and fully understood that prayer and Bible reading would be practiced in these schools, for this was the almost universal practice in the early constitutional period.[34] Since the Ordinance was patterned after the Massachusetts and New Hampshire constitutions, the practice of these states is especially relevant.[35]

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secular purpose was lacking, but *only* when it has concluded that there was *no question* that the statute or activity was motivated *wholly* by religious consideration." 104 S.Ct. at 1362 (emphasis added).

[34] Walter H. Small cites numerous regulations from various New England communities requiring headmasters to begin and even end the school day with prayer. W. SMALL, EARLY NEW ENGLAND SCHOOLS 301-03 (1969). *See* letters and reports collected under the topic *Schools As They Were Sixty Years Ago* in the AMERICAN JOURNAL OF EDUCATION concerning Connecticut, which had morning prayers and Bible study with the Bible as the only reading book until 1793: THE AMERICAN LEGACY OF LEARNING 161-62 (J. Best & R. Sidewell eds. 1967); 13 AM. J. EDUC. 123, 129-32 (1863); 16 *id.* at 137 (1866); 26 *id.* at 225 (1876). Delaware school opened by prayer and singing a hymn: 17 AM. J. EDUC. 187-88 (1867). Rhode Island students daily recited the Lord's Prayer and Ten Commandments: 27 *id.* at 707, 711-12 (1877).

[35] According to excerpts from the Massachusetts Common School Journal, "the Bible was the only reading book, Dilworth's Spelling Book was used, and the New England Primer." This Primer contained the Lord's Prayer, the Ten Commandments, books of the Old and New Testaments, and the Shorter Catechism. 12 MASS. COMMON SCHOOL J. 311-12, quoted in 14 AM. J. EDUC. 746 (1863). In 1789, before the establishment clause was adopted by Congress, the Massachusetts legislature required all common school teachers to be certified by a minister or ministers of the community in which they were to teach that each was morally qualified for the job. Act of June 25, 1789, ch. 19, 1789 Mass. Acts 416, 418. For a study of the content and broad influence of the New England Primer and use of the Bible as a leading textbook, *see* S. COHEN, A HISTORY OF COLONIAL EDUCATION 1607-1776, 60-63, 141 (1974) and 30 AM. J. EDUC. 371 (1880).

In New Hampshire the school day began and often ended with prayer and reading from the Bible, which, with the Psalter and

Anson Phelps Stokes, whose treatise and exhaustive research is highly respected on the subject of religion in American public and private schools, concludes that the fathers of the republic were accustomed "to the teaching of religion in virtually all schools." [36] The practice applied equally to the federal territories, the states, and Washington, D.C., as noted by contemporaneous acts of early Congresses.

When Congress created the Mississippi Territory in 1798, from which Alabama was later formed, it encouraged the teaching of religion and morality in its schools by providing that the people of the territory "shall be entitled to and enjoy all and singular the rights, privileges and advantages granted to the people of the territory of the United States, northwest of the river Ohio," in the ordinance of July 13, 1787.[37] This applied the "religion" in public schools' language of the Northwest Ordinance to the Mississippi Territory. Four years later Congress reserved a section in each township for "the support of schools." [38]

When Alabama was admitted into the Union in 1819, article 6 of its constitution required that "the general assembly . . . take measures to preserve from unnecessary waste or damage such lands as are, or hereafter may be, granted by the United States for the use of schools within each township in this State, and apply the funds which may be raised from such lands in *strict conformity to the object of such grant.*" [39] The Alabama School Code

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New Testament, were the only reading books until the time of the Revolution. *See, e.g.*, W. SMALL, *supra* note 34, at 300-04; W. BURTON, THE DISTRICT SCHOOL AS IT WAS 55 (C. Johnson ed. 1928).

[36] 2 A. STOKES, CHURCH AND STATE IN THE UNITED STATES 48 (1950).

[37] Act of Apr. 7, 1798, ch. 28, § 6, 1 Stat. 549, 550.

[38] Act of Mar. 3, 1803, ch. 27 §§ 11 & 12, 2 Stat. 229, 233-34; Act of Mar. 3, 1817, ch. 62, § 3, 3 Stat. 375 (dealing with survey).

[39] ALA. CONST. of 1819, art. VI (emphasis added).

of 1927 refers to article III of the Northwest Ordinance as the "parent of the educational laws of the several states and of the United States of America" and states that "religion, morality, and knowledge [are] necessary" for good government.[40]

If this Court refuses to permit Alabama school students and teachers to have a moment of individual silent prayer or meditation, the State of Alabama would be unable to carry out the very purpose of the grant of Section 16 lands as specified by the First and Fifth Congresses. Moreover, because the lands were granted by the federal government with this provision, they theoretically might now be subject to being taken back by the federal government if the state can no longer carry out the purpose for which they were granted.

Both Ohio and Mississippi also received federal school land in return for their willingness to teach religion and morality in schools financed by these lands, and Ohio even agreed with the First Congress that such a provision as to use of school lands was not a violation of the establishment of religion under its state constitution.[41]

The federal public schools in Washington, D.C. provide another strong example. When the first school district

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[40] ALABAMA SCHOOL CODE 7 (1927). North Carolina adopted the Northwest Ordinance verbatim under article IX, § 1 of its 1868 constitution. *See* N.C. CONST. of 1868, art. IX, § 1.

[41] In the same section of the 1802 constitution that protects Ohio's citizens against the establishment of religion and in their rights of conscience, Ohio's Constitutional Convention (and subsequently Congress by its admission of Ohio into the Union) approved this clause: "But religion, morality, and knowledge, being essentially necessary to good government and the happiness of mankind, schools and the means of instruction shall forever be encouraged by legislative provision, not inconsistent with the rights of conscience." OHIO CONST. of 1802, art. VIII, § 3. Also, Mississippi, in receiving federal school lands, provided in § 14 of the seventh article of its 1817 constitution: "Religion, morality, and knowledge being necessary to good government, the preservation of liberty, and the happiness of mankind, schools, and the means of education, shall forever be encouraged in this State."

was organized in Washington, D.C. in 1820, the Bible and the Watts Hymnbook were perhaps the only textbooks. Thomas Jefferson was the president of the school board. His approval of this curriculum is significant since the school was operated on federal land under congressional supervision.[42]

Congressional grants for evangelistic activities also provide important contemporaneous history. Early Congresses felt it their Christian duty to civilize the Indians in the federal territories by financially assisting the spread of the gospel. (T. 565) President Washington proclaimed a treaty on January 21, 1795, with the Oneida, Tuscorora, and Stockbridge Indians by which the United States paid "one thousand dollars, to be applied in building a convenient church at Oneida," New York, in place of the one which the British had burned in the Revolutionary War.[43]

Under Presidents Washington, Adams and Jefferson, Congress granted twelve thousand acres and extended the grant on five occasions to the Moravians or "*society of the United Brethren, for propagating the gospel among the heathen*" or Indians.[44] None of the three Presidents

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[42] J. WILSON, 1 PUBLIC SCHOOLS OF WASHINGTON 4-6 (Records of the Columbia Historical Society of 1897). Jefferson, as author of the much quoted "wall of separation" phrase, apparently saw no conflict between this federal public school practice and the establishment clause. However, Jefferson's views are really not relevant to the meaning of the establishment clause, because he did not participate in the first amendment debates, and was instead in Europe as minister of France from 1784 to November 1789.

[43] Treaty of Dec. 2, 1794, art. 4, 7 Stat. 47-48.

[44] Act of June 1, 1796, ch. 46, 1 Stat. 490-91 (4th Cong.) (emphasis added); re-enacted Act of Mar. 2, 1799, ch. 29, 1 Stat. 724 (6th Cong.); Act of Mar. 1, 1800, ch. 13, 2 Stat. 14-16 (6th Cong.); Act of Apr. 26, 1802, ch. 30, 2 Stat. 155 (7th Cong); Act of Mar. 3, 1803, ch. 30, 2 Stat. 236-37 (7th Cong.); and Act of Mar. 19, 1804, ch. 26, 2 Stat. 271-72 (8th Cong.), quoted in R. CORD, *supra* note 12, at 42-46, 62 & 263-70. Land was originally set aside by the Continental Congress for propagating the gospel among the heathen by Ordinance of May 20, 1785, 28 J. OF THE CONTI-

vetoed these six acts, indicating that they did not find them to be a violation of the establishment clause. (42a)

On October 31, 1803, Jefferson asked the Senate to give consent to a treaty with the Kaskaskia Indians that contained the following clause (T. 540):

> And whereas, *The greater part of the said tribe have been baptized and received into the Catholic church* to which they are much attached, the *United States will give annually for seven years one hundred dollars towards the support of a priest of that religion*, who will engage to perform for the said tribe the duties of his office and also to *instruct* as many of their *children* as possible in the rudiments of literature. And *the United States will further give the sum of three hundred dollars to assist the said tribe in the erection of a church.*[45]

Professor Cord cites page after page of early congressional enactments that provided federal land or appropriated federal funds to establish and fund Indian schools to the Moravians, the Missionary Society of New York, the Hamilton Baptist Missionary Society of New York, the American Board of Commissioners for Foreign Missions, the Baptist Board for Foreign Missions, the Cumberland Missionary Society, the United Foreign Mission Society of New York and the Foreign Mission Society of the Synod of South Carolina.[46]

NENTAL CONG. 375-81; Ordinance of July 23, 1787, 33 *id.* 399-401; Ordinance of July 27, 1787, *id.* 429-30; and Ordinance of Sept. 3, 1788, 34 *id.* 485-86. James Madison sat on the committee proposing this grant of land for the later ordinance.

[45] Treaty with the Kaskaskia Indians of Oct. 31, 1803, No. 104, 7 Stat. 78-79 (8th Cong.) (emphasis added), quoted in R. CORD, *supra* note 12, at 38-39, 261-63 (37a).

[46] *See* R. CORD *supra* note 12, at 63-73. In granting government land for religious purposes, Congress was simply following the practice of the states. Nine of the original thirteen states supported the teaching of religion in public or private schools with tax money or land. In addition to Massachusetts, New Hampshire, and Georgia (noted earlier, *supra* note 23), Rhode Island, Connecticut, New York, Pennsylavnia, South Carolina and North Carolina granted

These contemporaneous acts of the early Congresses indicate that prayer and the teaching of religion in schools under federal control were seen as fulfilling a valid national purpose, the moral and spiritual preparation of Americans to take a useful role in our society. Especially the Indians, who had not previously experienced the benefits of a Christian civilization, would be better citizens by their receiving the gospel, and Congress singled out specific denominational groups to propagate it. However, since no national church was being established in doing so, neither Congress nor the courts found these acts offensive to the first amendment. Applying the historical test to the establishment clause, a state may constitutionally allow a period for silent individual prayer or meditation.

5. *Contemporaneous History of Prayer in Other Governmental Institutions.*

The day after the first amendment was approved in the House in its final form, Federalist Elias Boudinot of New Jersey asked that "all the citizens of the United States [be offered an opportunity] of joining, with one voice, in returning to Almighty God their sincere thanks for the many blessings he had poured upon them." By resolution, he requested that the President "recommend to the people of the United States a day of public thanksgiving and prayers."

However, Mr. Boudinot went further, even suggesting to the people the form of the prayer, "to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a Constitution of

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state land for the support of religious schools. *See, e.g.*, II STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS AT THE END OF THE CENTURY: A HISTORY 260-326 (1902); 27 AM. J. EDUC. 712 (1877); VIII CONN. STATE RECORDS 100 (1795); Act of Apr. 9, 1795, ch. 75, N.Y. Laws 18th Sess. 50-51; ch. 2557, 1791-1793 Pa. Laws 71-73; Act of Dec. 21, 1799, S.C. Stat. 357; *see also* ANTIEAU, DOWNEY & ROBERTS, *supra* note 28, at 62-72, 167-74.

government for their safety and happiness." [47] Although the resolution does not specify if the prayer should be verbal or silent, verbal prayer is implied by calling for public prayer, which was customarily oral in the eighteenth century.

Anti-Federalist Aldanus Burke of South Carolina immediately objected to "this mimicking of European customs, where they made a mere mockery of thanksgivings." [48] Thomas Tucker, also of South Carolina, but a Federalist, objected to the resolution because it was "a religious matter, and, as such, proscribed to [Congress]," apparently referring to the establishment clause passed the day before.[49]

Roger Sherman, a Connecticut Federalist, perhaps reflecting the position of the established Congregational Church of his state, found precedent for such days of thanksgiving in Scripture as at the time Solomon built the temple and "worthy of Christian imitation on the present occasion." [50] Mr. Boudinot quoted further precedents from the practice of the Continental Congress. The motion carried and President Washington on October 3, 1789, issued the Proclamation.[51]

As Chief Justice Burger points out in *Marsh v. Chambers*, 103 S. Ct. at 3335, the evidence of opposition to and subsequent approval of a resolution "infuses [the force of the historical argument] with power by demon-

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[47] 1 ANNALS OF CONG. 914 (J. Gales ed. 1789). *See* R. CORD, *supra* note 12, at 27-29.

[48] *Id.*

[49] *Id.* at 915. Both men had voted against the amendment the previous day.

[50] *Id.*

[51] *Id.* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897 64 (Richardson ed. 1901). President Washington issued a subsequent proclamation on January 1, 1795. *Id.* at 179-80. John Adams issued two and James Madison four during their terms as president. *Id.* at 268-70, 284-86, 513, 532-33, 558 & 560-61. See R. CORD, *supra* note 12, at 51-53, 251-60.

strating that the subject was considered carefully and the action not taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society."

Since the resolution was directed toward all the people of the United States, both adults and children, apparently teachers and students were to participate. As with the Northwest Ordinance, there is no evidence that Congress sought to protect children from being compelled to pray. Instead, there is evidence that Congress intended to include them without any fear that it was establishing a religion by doing so.

Prayers were offered in the Congress, in the courts, and after the first inaugural ceremony at St. Paul's Chapel led by the congressional chaplain.[52] Also, the First Congress authorized the President "by and with the advice and consent of the Senate" to appoint a chaplain for the "military Establishment of the United States."[53] Of great significance is Jefferson's Act of April 10, 1806, which "earnestly recommended" that army officers and enlisted men attend Divine worship services. Irreverent behavior by officers at Divine worship services was to be punished by court marshal with Presidential reprimand. (T. 541)[54]

After a comprehensive 302-page examination of the debates and acts of Congress and the individual states,

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[52] See *Marsh v. Chambers*, 103 S.Ct. 3330, 3333-34 (1983); *Abington School Dist. v. Schempp*, 374 U.S. 203, 213 & 309-10 (1963) (Brennan, J. concurring); *Engel v. Vitale*, 370 U.S. 421, 446-50 (1962) (Stewart, J., dissenting); *McCollum v. Bd. of Educ.*, 333 U.S. 203, 253-54 (1948) (Reed, J., dissenting); and *Katcoff v. Marsh*, 582 F. Supp. 463 (E.D.N.Y. 1984), holding that the Army chaplaincy does not violate the establishment clause, but is an effort to allow all soldiers to worship as they choose without coercion.

[53] Act of Mar. 3, 1791, ch. 28, §§ 1, 5, 1 Stat. 222-23. The compensation for the chaplain was to be "fifty dollars per month, including pay, rations and forage." *Id.* § 6.

[54] Act of Apr. 10, 1806, ch. 20, art. 2, 2 Stat. 359-60 (9th Cong.).

Professor Cord concludes, as has this Court, that Congress intended only to prevent the establishment of a national church. He adds: "[n]or does any substantial evidence suggest that nondiscrimiantory or indirect aid to religion or to religious institutions was to come under the ban of the First Amendment."[55] Alabama does not establish any national religion by the challenged statutes; instead, its allowing permissive silent prayer or meditation "respects the religious nature of our people and accommodates the public service to their spiritual needs." *Zorach v. Clauson*, 343 U.S. at 314.

B. The Establishment Clause Prohibits Only the Establishment of a National Church, as Shown by its Language and Intended Meaning.

The Court declared in *Lynch v. Donnelly*, 104 S.Ct. at 1361, that "[t]he real object of the [First] Amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government," quoting Justice Joseph Story.[56] Many constitutional scholars have reached the same conclusion, that the establishment clause forbids only the creation of a national established church, such as is indicated by former Justice Joseph Story, Professor Robert L. Cord of Northeastern University, the late Professor Mark DeWolf Howe of Harvard, Dr. James McClellan, formerly of Emory University, Professor John Baker of Louisiana State University Law School, Professor Wilbur Katz of University of Chicago Law School, Professor Peter Kauper of University of Michigan Law School, Professor Thomas Cooley of University of Michi-

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[55] R. CORD, *supra* note 12, at 50. *See Lynch v. Donnelly*, 104 S.Ct. at 1361.

[56] 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1871, at 728 (1833) [hereinafter cited as STORY'S COMMENTARIES], also quoted by Chief Justice Warren in *McGowan v. Maryland*, 366 U.S. 420, [illegible] (1961). *Accord, McCollum v. Bd. of Educ.*, 333 U.S. at 244 (Reed, J., dissenting). Joseph Story was a leading Unitarian of his time who served on the Supreme Court from 1811 to 1845 and as professor of law at Harvard Law School.

gan, Professor Edward Corwin of Princeton University, and Professor Walter Berns of University of Toronto, to mention a few.[57]

The district court below, relying on the exhaustive historical research of Professor Robert L. Cord in SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (Defendant-Intervenors' Exhibit 14), and the testimony and studies of Appellants' expert, Professor James McClellan (T. 519-606 and Defendant-Intervenors' Exhibits 12 and 13), reached the same conclusion as the *Donnelly* court:

> The First Amendment in large part was a guarantee to the states which insured that the states would be able to continue whatever church-state relationship existed in 1791. . . . The drafters of the First Amendment understood the First Amendment to prohibit the federal government only from establishing a national religion. Anything short of the outright establishment of a national religion was not seen as violative of the First Amendment.[58]

As Anson Stokes in his more exhaustive three volume work, CHURCH & STATE IN THE UNITED STATES, and Appellants' expert witness James McClellan in his essay, *The Making and the Unmaking of the Establishment Clause*, suggest that to the drafters of the first amendment, there were seven criteria of when a church was historically established in one of the early states: (1) salaries of the ministers of that church were paid from tax money; (2) the buildings of the established church were maintained with tax funds; (3) school teachers of

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[57] *See also* Justice Rehnquist, dissenting, in *Thomas v. Rev. Bd.* 450 U.S. 707, 721-22 (1981) and in *Stone v. Graham*, 449 U.S. 39, 45-46 (1980); Justice Stewart, dissenting, in *Abington School Dist. v. Schempp*, 374 U.S. 203, 309-310 and *Engel v. Vitale*, 370 U.S. at 445; and Justice Reed, dissenting, in *McCollum v. Bd. of Educ.*, 333 U.S. at 245-46, where he refers to Jefferson's accommodation of religious sects at the University of Virginia.

[58] *Jaffree v. Bd. of School Comm'rs.*, 554 F. Supp. at 1115 (JS 21d-22d). (T. 529-30).

the established church were paid with tax money; (4) only clergy from the established church were permitted to marry and bury; (5) a penalty was levied for not attending the services of the established church; (6) only members of the established church could preach; and (7) office holding was limited to members of the established church.[59]

Five of the thirteen states had continued their religious establishments when the Constitutional Convention met in Philadelphia in 1787: Connecticut, Massachusetts and New Hampshire supported the Congregational Church, and Georgia and South Carolina the Anglican Church.[60] These states jealously guarded their religious practices and control over their public schools. They were not about to give up their authority to the federal government.[61]

During the debates over ratification of the Constitution, five states without established churches proposed amendments to the First Congress to prohibit the federal government from establishing a national sect.[62]. One

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[59] 1 A. STOKES, CHURCH & STATE IN THE UNITED STATES 358-446 (1950); McClellan, *Establishment Clause*, *supra* note 12, at 300-08. *See also Larson v. Valente*, 456 U.S. 228, 244, n. 19 (1982) for Massachusetts' experience.

[60] R. CORD, *supra* note 12, at 4.

[61] The tension between these five states and the five states which petitioned the First Congress for an amendment *preventing* establishment of a national religion will become apparent in the debates on the establishment clause, discussed *infra* in subsection 1. The vote of three-fourths or ten of the thirteen states required by article V of the United States Constitution for the adoption of an amendment would have been impossible to attain if the first amendment had been intended to disestablish the state churches of these five states.

[62] Virginia and North Carolina proposed identical amendments dealing with religion: "[N]o particular religious *sect* or *society* ought to be favored or established by law in preference to others." 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 659 (2d ed. 1836) (emphasis added) [hereinafter cited as ELLIOT'S DEBATES] (Virginia, emphasis added); 4 *id.* at 244 (North Carolina). The

state, New Hampshire, where the Congregational Church was established, proposed an amendment to prevent the federal government from passing *any* law respecting religion.[63]

James Madison on June 8, 1789, after reworking these amendments, submitted the following amendment to the First Congress for its consideration: "The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall *any national religion* be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed." [64]

1. *Congressional Debates on the Establishment Clause.*

A week after Congress passed the Northwest Ordinance, encouraging the teaching of religion and morality in the schools of the Northwest Territory, it began debate on the establishment clause. The debate makes it quite clear that the establishment clause was intended only to prohibit establishment of a national church.

Professor Michael Malbin (22a) notes the importance of the article "an" prior to "establishment of religion" in the amendment's final version:

> Had the framers prohibited "*the* establishment of religion," which would have emphasized the ge-

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resolution of the Rhode Island Convention echoed Virginia's, 1 *id.* at 334.

The New York Convention demanded that "no religious *sect* or *society* . . . be favored or established by law in preference to others." 1 *id.* at 328 (emphasis added). Although Maryland's Convention offered no official demands for amendments, a proposed amendment read: "That there be no National Religion established by law; but that all persons be equally entitled to protection in their religious liberty." 2 *id.* at 553. *See* CORD *supra* note 12, at 6, 11. (T. 524)

[63] New Hampshire's ratifying convention proposed that "Congress shall make no laws touching religion, or infringing the rights of conscience." 1 ELLIOT'S DEBATES, *supra* note 62, at 326.

[64] 1 ANNALS OF CONG. 434-35 (J. Gales ed. 1789) (emphasis added). (7a)

> neric word "religion," there might have been some reason for thinking they wanted to prohibit all official preferences of religion over irreligion. But by choosing *"an establishment"* over "the establishment," they were showing that they wanted to *prohibit only those official activities that tended to promote the interests of one or another particular sect.*
>
> Thus, through the choice of "an" over "the," conferees indicated their intent. The First Congress did not expect the Bill of Rights to be inconsistent with the *Northwest Ordinance* of 1787, which Congress reenacted in 1789. . . .[65]

As will be seen in the following summary of the debates, several representatives feared that the clause "no religion shall be established by law" (as proposed by the select committee on July 28, 1789) might be interpreted as hostile toward all religion. (8a) The response of James Madison and other members of the House assured these individuals that the sole purpose of the amendment was to prevent establishment of a national religion which would interfere with the state religious establishments. (Madison altered his views a decade later.)

Peter Sylvester, a lawyer from New York, opened the debate by indicating his displeasure with the select committee's version because he feared the words could be construed "to have a tendency to *abolish religion altogether.*"[66] (11a) New York's proposed amendment pro-

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[65] M. MALBIN, RELIGION AND POLITICS, THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 14-15 (1978) (emphasis added), cited by R. CORD, *supra* note 12, at 11-12. Malbin's chapter *The Establishment Clause* is included in full in the Appendix to this brief commencing at 1a.

[66] 1 ANNALS OF CONG. 729 (J. Gales ed. 1789) (emphasis added). *See also* ANTIEAU, DOWNEY, & ROBERTS, *supra* note 28, at 123-42. Professor Michael Malbin, *supra* note 65, at 7, suggests that Sylvester had two premises in mind as he spoke (11a):

> (1) He probably was concerned that the phrase "no religion should be established by law" could be read as a prohibition of all direct or indirect governmental assistance to religion, including land grants to church schools, such as those con-

vided only that "no religious *sect* or *society* . . . be favored or established by law in preference to others." [67]

Massachusetts' anti-Federalist leader, Elbridge Gerry, proposed that the amendment be reworded to read "no religious *doctrine* shall be established by law," which would have permitted such federal aid to religion in general as that of the Northwest Ordinance.[68] (12a) Massachusetts' constitution of 1789 provided that Protestant religious teachers in public schools could be paid from state tax funds to instruct in "piety, religion and morality." [69]

Roger Sherman, staunch Federalist from Connecticut, stated that he saw no need for an amendment, since the federal government had no authority to deal with religion.[70] (12a)

However, Federalist Daniel Carroll of Maryland favored the amendment because "many sects ha[d] concurred in opinion that they [were] not well secured under the present constitution." He believed that the amendment would "tend more towards conciliating the minds of the people to the Government than almost any other amendment he had heard proposed." [71] (13a) His state's

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tained in the Northwest Ordinance, or religious tax exemptions. (2) Sylvester apparently thought some form of governmental assistance to religion was essential to religion's survival.

[67] 1 ELLIOT'S DEBATES, *supra* note 62, at 328 (emphasis added).

[68] 1 ANNALS OF CONG. 730 (J. Gales ed. 1789) (emphasis added). As pointed out by Rep. Gerry later in the debate, the Federalists favored ratifying the Constitution as it was while the anti-Federalists wanted amendments before ratification. *Id.* at 731.

[69] MASS. CONST. of 1780, Pt. I, art. III (1780).

[70] 1 ANNALS OF CONG. 730 (J. Gales ed. 1789). Connecticut also had established the Congregational Church.

[71] *Id.* Malbin believes these remarks were directed to the anti-Federalists.

constitutional proposal was almost identical to Madison's original draft.[72]

Madison responded that "he apprehended the meaning of the words to be, that Congress should not establish *a* religion, and enforce legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience," for some states were of the opinion that Congress might "establish *a national* religion" and had therefore required the amendment.[73] (13a)

Benjamin Huntingdon of Connecticut, protecting his state's established church, agreed with Rep. Sylvester that the words "no religion shall be established by law" might be taken in such latitude as to be extremely hurtful to the cause of religion." (14a) In particular he feared that the federal courts would not enforce a state law which required that citizens pay taxes to support ministers and build meeting houses. Although he favored Rhode Island's prohibition of the establishment of a religion, he did not want the amendment to be worded in a way "to patronize those who professed no religion at all." [74]

Madison then suggested a return to the language of June 8th by adding the word "national" before "religion," for "the people feared one *sect* might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." [75] (14a) Madison's decade-later interpretation should be

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[72] 2 ELLIOT'S DEBATES, *supra* note 62, at 553.

[73] 1 ANNALS OF CONG. 730 (J. Gales ed. 1789) (emphasis added). This sentence was quoted by Justice Reed, dissenting, in *McCollum v. Bd. of Educ.*, 333 U.S. 203, 244 (1948), to support his conclusion that "[t]he phrase 'an establishment of religion' may have been intended by Congress to be aimed only at a state church." Justice Reed believed that Madison "by no means interpreted it to inhibit Congress from encouraging religion," according to F. O'Brien. F. O'BRIEN, JUSTICE REED AND THE FIRST AMENDMENT 132 (1958).

[74] 1 ANNALS OF CONG. 730 (J. Gales ed. 1789).

[75] *Id.* (emphasis added).

reviewed in light of his contemporaneous statements about the establishment clause.

Samuel Livermore of New Hampshire, reflecting strong anti-Federalist sentiment, objected to the word "national," and offered in its place the language proposed by the New Hampshire ratifying convention: "Congress shall make no laws *touching* religion, or infringing the rights of conscience."[76] By the word "touching" Livermore apparently intended to prohibit any federal interference with the established Congregational Church of his state. (15a)

After further opposition to the word "national" from staunch anti-Federalist Elbridge Gerry of Massachusetts, who had earlier proposed the words "religious doctrine" over "national religion," Madison withdrew his motion for insertion of the word "national" before "religion." He insisted, however, on making his point clear by observing that the words "no national religion shall be established by law" did not imply that the government was a national one.[77] Then Livermore's motion passed 31 to 20. (15a-17a)

The House was divided between the Federalists (who did not feel any amendments to the Constitution were necessary) and the anti-Federalists (who did not want any reference to a "national" government or religion in the clause and insisted on amendments to the Constitution before it was ratified).[78] The House was also split between the states that wanted to protect their established churches from the federal government and those that wanted to prevent the establishment of a national church. However, it is clear from the debates that Congressmen from states with established churches (Connecticut and Massachusetts) and those without (New York) agreed that a narrow meaning be given to the

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[76] *Id.* at 731 (emphasis added).

[77] *Id.*

[78] *See* remarks of Rep. Gerry, *id.*

establishment clause so that it would not prove to be hostile toward all religion, as this Court recently held in *Lynch v. Donnelly*, 104 S.Ct. at 1359.

After further debate the House adopted a slightly different version on August 21, 1789, restoring the words "establishing religion," which was then reported to the Senate.[79] (17a)

Although the Senate debates of September 3 and 9, 1789, were kept secret, five versions considered by that body prohibited Congress from making any law "establishing one religious *sect* or *society* in preference to others" (accepted and then amended), "establishing any religious sect or society" (defeated), "establishing any particular denomination of religion in preference to another" (defeated), "establishing religion" (accepted and then amended), and finally, as sent back to the House, "establishing *articles of faith* or a *mode of worship*."[80] (19a-20a)

The Senate's version was referred to a conference committee on which Madison and Sherman sat.[81] The compromise "Congress shall make no law respecting *an* establishment of religion, or prohibiting the free exercise thereof" was submitted to first the House, then the Senate, and subsequently approved, respectively, on September 24 and 25, 1789.[82]

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[79] 1 JOURNAL OF THE HOUSE OF REPRESENTATIVES 107 (1789). "Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed." *Id.*

[80] 1 JOURNAL OF THE FIRST SESSION OF THE SENATE 70, 77 (emphasis added) [hereinafter cited as SENATE J.].

[81] Also, on September 7, 1789, the Senate defeated an amendment that would have prohibited the *states* from infringing on the rights of conscience. *Id.* at 72.

[82] 1 ANNALS OF CONG. 913 (J. Gales ed. 1789) and 1 SENATE J. 88 (1789) (emphasis added).

The Senate's approval of the words "one religious sect or society" and "articles of faith or a mode of worship" indicates that it did not intend that the federal government be prohibited from aiding all religion. (18a-20a) Instead, the phrase "*an* establishment of religion" in the final version indicates that Congress simply intended to prevent the establishment of a national religious sect or denomination, as confirmed by Madsion during the debates. This narrow reading of the establishment clause is confirmed by the debates of the state legislatures which subsequently ratified it and by Congress' contemporaneous passage of the Northwest Ordinance and the Prayer Day Resolution.

2. *State Ratification of the Establishment Clause.*

In 1785, Virginia had refused to permit state tax money to be used to support teachers of religion.[83] In 1787, its constitutional convention had ratified the federal Constitution with a proposed amendment guaranteeing "that no particular religious sect or society ought to be favored or established, by law, in preference to others." [84]

When the Bill of Rights was submitted to the Virginia legislature for ratification in the fall of 1789, many feared that the language did not adequately restrict the federal government. After adoption by the House of Delegates on November 30, 1789, the Senate postponed ratification until December 15, 1791. A statement signed by six members of the majority in the Senate may explain the two-year delay:

> The [First] Amendment, recommended by Congress does not prohibit the rights of conscience from being violated or infringed; and *although it goes to restrain Congress from passing laws establishing any national religion*, they might, notwithstanding *levy taxes to any amount, for the support of religion or*

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[83] *See Everson v. Bd. of Educ.*, 330 U.S. 1, 11-13 (1947).

[84] 3 ELLIOTT'S DEBATES, *supra* note 62, at 659.

> *its preachers*; and any particular denomination of Christians might be so favored and supported by the General Government, as to give it a decided advantage over others, and in process of time render it as powerful and dangerous as it was established as the national religion of the country.[85]

The Senators apparently feared that the federal Congress would advance all religion or appropriate tax money for the benefit of all denominations, as had been proposed and rejected in Virginia's schools in 1785. The First Congress' re-enactment of the Northwest Ordinance shows that their fears were well grounded, for this act granted federal land for religious purposes and to schools that teach religion and morality.

The fact that none of the other states objected to the wording of the establishment clause or to the First Congress' passage of the Northwest Ordinance indicates that Virginia was clearly in a minority in its views, something which this Court has often overlooked.[86]

In fact, the citizens of North Carolina apparently approved of the practice. Reverend Nicholas Collins, in an article published during the debates in the North Caroline legislature, noted how a multiplicity of sects would prevent an establishment and advocated that every state and the federal government in the territories should provide a system of education "with sensible teachers, who shall instruct their pupils in the capital principles of religion, which are generally received, such as the being and attributes of God, his rewards and judgments, a future state, etc."[87] The Northwest Ordinance, whose

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[85] JOURNAL OF THE VIRGINIA SENATE 51 (1789) (emphasis added).

[86] For an exhaustive study of the state legislative debates on the establishment clause, *see* ANTIEAU, DOWNEY & ROBERTS, *supra* note 28, at 143-58.

[87] Fayettville Gazette, Sept. 14, 21; October 12, 1789. This article was also widely circulated in an influential magazine, 5 THE AMERICAN MUSEUM 303 (October 1789), after being published in the New York newspapers in June 1789. ANTIEAU,

history and impact were discussed earlier, fulfilled Collins' desires for inclusion of religion in the curriculum in schools under federal control.

C. The Establishment Clause Forbids the "Hostility" and "Callous Indifference" toward Religion that Would Be Shown by Barring a Moment for Individual Silent Prayer or Meditation, and Instead Allows the "Accommodation" and "Benevolent Neutrality" toward Religion that Is Shown by Sustaining a Moment of Silence.

The Alabama statute accommodates the free exercise of the religious beliefs and free exercise of speech and belief of those affected, permitting the government to assume the role of benevolent neutrality. This protection of the right of teachers to call for a moment of silence for permissive prayer or meditation is not an establishment of a national church.

This Court recently held in *Lynch*:

> [The Constitution] affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. *See, e.g., Zorach v. Clauson*, 343 U.S. 306, 314, 315, 72 S.Ct. 679, 684, 96 L. Ed. 954 (1952); *McCollum v. Board of Education*, 333 U.S. 203, 211, 68 S.Ct. 461, 465, 92 L. Ed. 649 (1948). Anything less would require the "callous indifference" we have said was never intended by the Establishment Clause. *Zorach*, *supra*, 343 U.S. at, 314, 72 S.Ct. at 684. Indeed, we have observed, such hostility would bring us into "war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion." *McCollum*, *supra*, 333 U.S., at 211-212, 68 S.Ct., at 465.

DOWNEY, & ROBERTS, *supra* note 28, at 157 add: "[w]hen this statement is considered in relation to the events in the first convention, it is apparent the citizens of North Carolina did not intend to embody a revolutionary principle in the First Amendment which would strip the federal government of power to recognize the need of her religious citizens."

Lynch v. Donnelly, 104 S.Ct. at 1359. "To hold that [the government] may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe." [88]

Judge Roney, dissenting with three other judges from the denial of the Petition for Rehearing in this case by the Eleventh Circuit, agreed with First Circuit Chief Judge Coffin and District Judges Murray and Skinner in *Gaines v. Anderson*, 421 F. Supp. 337, 343 (D. Mass. 1976), that a statute which requires a period of silence for prayer or meditation "accommodate[s] students who desire to use the minute of silence for prayer or religious meditation, and also other students who prefer to reflect upon secular matters." [89] (JS 3b)

This Court held in *Marsh* that "to invoke Divine guidance on a public body . . . is not, in these circumstances, an establishment of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh v. Chambers*, 103 S.Ct. at 3336.[90]

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[88] *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

[89] The court cites a number of the nation's leading constitutional scholars who believe that moments of silence may be permissible: L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6, at 829 (1978); P. FREUND, RELIGION AND THE PUBLIC SCHOOLS: THE LEGAL ISSUE 23 (1965); Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 371 (1963); Kauper, *Prayer, Public Schools and the Supreme Court*, 61 MICH. L. REV. 1031, 1041 (1963). The *Gaines* case was relied on by the court in *Jaffree v. Wallace*, 713 F.2d at 614. (JS 3b) Justice Brennan, concurring in *Abington School Dist. v. Schempp*, 374 U.S. 203, 281 & n. 57 (1963), suggested that "the observance of a moment of reverent silence at the opening of class" would likely meet the test of constitutionality. *See also Reed v. Van Hoven*, 237 F. Supp. 48, 56 (D. Mich. 1965).

[90] *See also Mueller v. Allen*, 103 S.Ct. 3062 (1983) (tuition tax credits); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981) (exemption of religious school employees from

Certainly in light of the contemporaneous acts of Congress with respect to public schools examined in the previous sections, the Founding Fathers would draw no distinction between a state legislature's verbal prayers (held constitutional in *Marsh*) and a school child's silent prayers or meditation. Neither would be considered the establishment of a national church or of religion in any form.

As Justice Brennan has noted, "even when the government is not compelled to do so by the free exercise clause, it may to some extent act to facilitate the opportunities of individuals to practice their religion." *Marsh v. Chambers*, 103 S.Ct. at 3346. *Accord, Walz v. Tax Comm'n*, 397 U.S. at 673.

However, the notion of accommodation does not require leveling of all religious beliefs. The founders of America intended that believers in God from different denominations be accommodated by the federal government vis-a-vis one another, not that the government be required to give non-believers equal treatment with believers.[91] This Court has omitted an important part of

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unemployment taxes); *Gillette v. United States*, 401 U.S. 437 (1971) (exemptions from compulsory military service for religious objectors); *Walz v. Tax Comm'n.*, 397 U.S. 664 (1970) (property tax exemptions for religious organizations); *Arlans Dep't Store, Inc. v. Ky.*, 371 U.S. 218 (1962) (dismissing for want of a substantial federal question an appeal challenging the constitutionality of exemptions from Sunday closing laws for the benefit of Sabbatarians); *McGowan v. Md.*, 366 U.S. 420 (Sunday closing laws); *Zorach v. Clauson*, 343 U.S. 306 (off-premises public school release time programs); and *Quick Bear v. Leupp*, 210 U.S. 50 (1908) (use of Indian trust monies for sectarian education). *Cf. Widmar v. Vincent*, 454 U.S. 263 (1981) (striking down prohibition on religious group meetings on public university campus); *McDaniel v. Paty*, 435 U.S. 618 (1978) (striking down prohibition on service by ministers as delegates to state constitutional convention).

[91] James Madison and the Virginia constitutional ratifying convention defined religion as "the duty we owe to our Creator, and the manner of discharging it." 3 ELLIOTT'S DEBATES *supra* note 62, at 659. *See also* article 16 of the Virginia Bill of Rights, June

Justice Story's statement when it quotes him in *Lynch v. Donnelly*, 104 S.Ct. at 1361:

> The real object of the amendment was *not to countenance, much less to advance, Mahometanism [sic], or Judaism, or infidelity by prostrating Christianity; but to exclude all rivalry among Christian sects, and* to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. . . .[92] (T. 530)

Justice Story explained the public attitude that gave rise to the first amendment as follows:

> Probably at the time of the adoption of the Constitution, and of the [first] amendment to it . . . the general if not the universal sentiment in America was, that Christianity ought to *receive encouragement from the state* so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to *level all religions*, and to make it a matter of state policy to hold all in *utter indifference*, would have created *universal disapprobation*, if not *universal indignation*. . . .[93]

In view of the language, intent, and history of the establishment clause and contemporaneous acts of the First Congress and subsequent Congresses, Appellants Smith petition this Court to find that a moment for individual silent prayer or meditation was constitutional in schools supported by federal aid during the early congressional period and is now constitutional in public schools.

12, 1776, *reprinted in* C. JAMES, DOCUMENTARY HISTORY OF THE STRUGGLE FOR RELIGIOUS LIBERTY IN VIRGINIA 62 (1900).

[92] 3 STORY'S COMMENTARIES, *supra* note 56, § 1871, at 728 (portions omitted from *Lynch* are underlined).

[93] 3 STORY'S COMMENTARIES, *supra* note 56, § 1868, at 726 (emphasis added).

D. The Establishment Clause Was Never Applied to the States, Other than by Judicial Error, as Demonstrated by the Language, Intent, and History of the Fourteenth Amendment.

The establishment clause did not apply to the states initially, as the language of the clause ("Congress . . ."), early Supreme Court decisions, and historical practice indicate. *Permoli v. New Orleans*, 44 U.S. (3 How.) 589 (1845). Five states had established churches when the first amendment was drafted in 1789, and these states made certain that the establishment clause was never applied to the states (amendments to the Constitution required a three-fourths majority of the states).

The fourteenth amendment did not apply the establishment clause to the states as the clear record of the congressional and state debates shows. Professor Raoul Berger of Harvard Law School, on whom the U.S. district court judge relied, reached this conclusion in his scholarly study entitled GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT:

> The historical records all but incontrovertibly establish that the framers of the Fourteenth Amendment confined it to protection of carefully enumerated rights against State discrimination, deliberately withholding federal power to supply those rights where they were not granted by the State to anybody. . . .[94]

Berger's conclusion was the result of 431 pages of detailed discussion with many hundreds of footnotes. The court below also relied on a scholarly article by Professor Charles Fairman, then of Stanford Law School, entitled: *Does the Fourteenth Amendment Incorporate the Bill of Rights?*[95] The same conclusion has been

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[94] R. BERGER *supra* note 12 at 407, cited in *Jaffree v. Bd. of School Comm'rs.*, 554 F. Supp. at 1120-22 (JS 31d-35d).

[95] Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5 (1949), cited in *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1119 (JS 29d). *See also* H. MEYER,

reached by numerous other scholars.[96]

In their Jurisdictional Statement, Appellants Smith set forth at pages 11-21 reasons why the establishment clause did not apply to the states. These reasons are summarized as follows: (1) The purpose of the fourteenth amendment was to limit the power of the states only when they failed to provide due process of law or equal protection of the law to their citizens. (2) The debates of the 39th Congress on the version of the fourteenth amendment finally adopted and the debates of the state legislatures which ratified it do not contain a single reference to the establishment clause or the establishment of religion.[97] (3) State and federal Supreme Court decisions rendered immediately after the adoption of the fourteenth amendment show conclusively that no court believed that either the establishment clause or other portions of the first eight amendments were applicable to the states. (4) The reliance of Justice Black in his dissent in *Adamson v. California*, 332 U.S. 46, 115 (1947) on the remark of Rep. Bingham in 1871, five years after the congressional debates, that the first eight amendments did apply to the states has been seriously challenged by Professor

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THE HISTORY AND MAKING OF THE FOURTEENTH AMENDMENT: JUDICIAL EROSION OF THE CONSTITUTION THROUGH THE MISUSE OF THE FOURTEENTH AMENDMENT (1977), excerpts from which were introduced into evidence as Defendant-Intervenors' Exhibit 15.

[96] An impressive number of scholars have also written in support of the Fairman view and in opposition to Justice Black's extension of the establishment clause to the states. *E.g.*, M. HOWE, THE GARDEN AND THE WILDERNESS 22-33 (1965); W. KATZ, RELIGION AND THE AMERICAN CONSTITUTIONS (1964); Katz, *The Case for Religious Liberty*, in J. COGLEY, RELIGION IN AMERICA 101 (1958); Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L. Q. 371; and J. O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION 10 (1949). *But see*, Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954).

[97] Professor James McClellan, constitutional expert for appellants, testified that the issue of application of the establishment clause to the states "was not even debated when the fourteenth amendment was prepared and drafted [by] Congress." (T. 544-45)

Bernard Schwartz in his STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS. Schwartz notes that Bingham's 1871 speech was not adopted by Congress, but was a proposal to it for future actions to be taken.[98] (5) Congressional debates on the Blaine Amendment show that Representatives and Senators who participated in the debates on the fourteenth amendment just seven years earlier did not believe that the establishment clause was applied to the states. (T. 546-47)[99]

This Court's decision that silent individual prayer and meditation is constitutional may rest on either a careful reading of establishment clause history or on re-examination of application of this clause to the states through the fourteenth amendment. Appellants Smith urge this Court to re-evaluate the language, intent, and contemporaneous history of both the the first and fourteenth amendments in order to redress the grievous interference with their free exercise of religion in this case. Much of this interference has been brought about by this Court's thrusting itself into the role of sole arbiter of state establishment disputes which the drafters of these amendments intended to be left to the states to decide under their own constitutions and religious convictions. Should this Court find that recent but erroneous reliance on precedents violates the meaning, intent, and history of the first and fourteenth amendments, then the Court should find, as Justice Holmes did, that the error is "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 532-33 (1928), quoted

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[98] B. SCHWARTZ, I STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 294, 306-07 (1970): "Never in the 1866 debates did Bingham refer specifically to the now claimed incorporation of the Bill of Rights in the new amendment. . . ."

[99] *See* Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939 (1951).

in *Erie v. Tompkins*, 304 U.S. 64, 79 (1938) (per Brandeis, J.).[100]

CONCLUSION

Considerable evidence was presented to the trial court in an adversarial context in this case which was not available to the Supreme Court when it passed upon the meaning of the establishment clause and its applicability to the states in *Everson*, *Engel*, and *Abington*:

(1) Testimony and research showing how rivalry between the former colonies and fear of a national religious establishment caused the First Congress to prohibit the federal government from promoting a single religious sect or denomination while not intending thereby to show hostility toward religion. "The real object to the [First] Amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government." [101]

(2) An extensive study of federal financial projects such as the Northwest Ordinance which advanced religion in public education during the early constitutional period—projects which were approved by both Jefferson and Madison.[102] "[N]ondiscriminatory or indirect aid to religion or to religious institutions was [not] to come under the ban of the First Amendment . . . ," according to the exhaustive research of Professor Cord.[103]

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[100] This Court in *Erie* relied on "recent historical research by a competent scholar" in overruling almost 100 years of judicial assumption of power. *Erie v. Tompkins*, 304 U.S. 64, 72-73 (1938).

[101] *Lynch v. Donnelly*, 104 S.Ct. at 1361. *Accord* T. 530-32. The expert testimony of Professor James McClellan was expanded on by his article, *The Making and the Unmaking of the Establishment Clause*, *supra* note 12. *See also* R. CORD, *supra* note 12, at 3-15 with M. MALBIN, *supra* note 65, at 1-17 (1a-27a), quoted extensively by Cord.

[102] R. CORD, *supra* note 12 (Defendant-Intervenors' Exhibit 14, copies of which have been lodged with the Office of the Clerk for the convenience of this Court and excerpts from which are contained in the Appendix at 1b.)

[103] R. CORD, *supra* note 12, at 50.

(3) Extensive evidence on the erroneous application of the establishment clause to the states through the fourteenth amendment.[104]

If the First Congress which passed the first amendment could set aside federal lands for public schools to teach religion and morality and then mandate a national day of prayer which was apparently to be observed by adults and school children alike, then the lesser activity of observing a moment of silence for individual prayer or meditation is certainly constitutional. This conclusion is inescapable under the historic view as an accommodation of religion and speech.

As this Court states in *Lynch v. Donnelly*, 104 S.Ct. at 1359, "[This Constitution] affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." Holding a period of silence for individual prayer or meditation constitutional is consistent with prior holdings of this Court which permitted beneficial aid to religion.[105]

Prior decisions of lower courts which have sought to apply this Court's decisions have had a chilling effect on the prayers of students and teachers.[106] Although perhaps unintended by this Court or lower courts, such rulings

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[104] *See* R. BERGER, *supra* note 12, cited with approval by the court below, *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1122; and H. MEYER, *supra* note 95. *See also* Jurisdictional Statement of Appellants Smith at pages 11-21.

[105] *See* cases cited in *Lynch*, 104 S.Ct. at 1363.

[106] *Stein v. Oshinsky*, 348 F.2d 999, 1002 (1965) required parents of kindergarten children to "content themselves with having their children say [their] prayers before nine or after three." The court below held that the establishment clause prohibited "any government involvement with religion" (JS 8a) and that "the state cannot participate in the advancement of religious activities through any guise, including teacher-led meditation," (JS 18a) *Jaffree v. Wallace*, 705 F.2d at 1531, 1536.

seem to interfere with the authority of God over prayer.[107]

The 624 teachers, parents and students who are Appellants Smith petition this honorable Court (1) to examine the historical evidence presented for the first time to the trial court below by the adversarial system, (2) to restore the original intent of the establishment clause by permitting the observance of a moment of silence for meditation or permissible prayer, and (3) to return such matters of state law to the state courts to decide under their own constitutions, thus affirming the conclusions of the trial court below.

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[107] Justice Douglas, dissenting in *McGowan v. Maryland*, 366 U.S. 420, 562 (1961), acknowledged this higher authority, citing the Declaration of Independence:

> The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect.

James Madison expressed the same sentiment before the Virginia Constitutional Ratifying Convention on June 12, 1788: "There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation." S. PADOVER, THE COMPLETE MADSION 306 (1953).

APPENDIX

RELIGION AND POLITICS

The Intentions of the Authors of the First Amendment

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Washington, D.C.

1978

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1 THE ESTABLISHMENT CLAUSE

A great deal has been written about the original meaning of the establishment of religion clause, much more than has been written about free exercise. But for all of this writing, nobody has tried to interpret the debates in the First Congress on a speech-by-speech basis.

One reason for this reluctance to look into the legislative history has to do with the sources available to the scholar. It always has been known that the *Annals of Congress*, by far the most complete records of the debate available, is taken from the shorthand notes of a reporter, Thomas Lloyd, who compiled them for private sale. Because there were no verbatim or official notes of those early congressional debates, most historians have been reluctant to lean too heavily on them for their interpretations.

Recent archival work has made it possible for the student of the religion clauses to use the *Annals* with much greater confidence than might have been felt in the past. The First Congress Project at George Washington University, sponsored by the National Archives, has been collecting a massive amount of material in preparation for what it expects to be the definitive multivolume documentary history of the First Congress.[1] While the same cannot be said for all of the clauses in the Bill of Rights, nothing collected by the First Congress Project suggests any reason for dissatisfaction with the *Annals* on the religion clauses. Lloyd may not have recorded every word of every speech, but at no point do the other

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[1] The project director is Professor Linda Grant DePauw. The first of a projected seventeen volumes was: *Documentary History of the First Federal Congress of the United States of America, Vol. 1: Senate Legislative Journal* (Baltimore and London: Johns Hopkins University Press, 1972). I should like to thank the project's two assistant editors, Charlene B. Bickford and Lavonne M. Hoffman, for their assistance.

accounts of the debates add new information to the *Annals* or alter what was in them.

Lloyd's notes tell us that the members of the First Congress did not intend the establishment clause to mean anything remotely resembling what the Supreme Court has been saying it means, at least since 1947. Some of the justices in recent years appear to have recognized that the Court's rulings have not been based on a proper reading of 1789 history.[2] But the justices have not replaced the earlier misreadings of history with an alternative interpretation. Instead, they have been acting almost as if their recognition of their predecessors' historical errors have liberated them from the need to consider what purposes the members of the First Congress may have meant the religion clauses to serve.

The turning point in the recent history of the establishment clause was the 1947 parochial school busing case of *Everson* v. *Board of Education*.[3] In the opinion written for the Court by Hugo Black, the Court announced a rule of law, endorsed by dissenters as well as by the five-justice majority:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.[4]

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[2] See, for example, Walz v. Tax Commission of the City of New York, 397 U.S. 664, 668, 90 S. Ct. 1409, 25 L.ed.2d 697 (1970), where Chief Justice Burger refers favorably to C. J. Antieau, A. T. Downey, and E. G. Roberts, *Freedom from Federal Establishment: Formation and History of the First Amendment Religion Clauses* (Milwaukee: Bruce, 1964), p. 6, note 9, without adopting their affirmative thesis.

[3] 330 U.S. 1, 67 S. Ct. 504, 91 L.ed. 711 (1947).

[4] 330 U.S. 1, 15.

There were two key elements in this rule. (1) The Court said that Congress cannot give nondiscriminatory aid to religion. There never was any question that the clause prohibited Congress from preferring one religion or group of religions over another, but this was the first time the Supreme Court took the additional step of prohibiting non-preferential aid to religion as such. (2) The other key element in the *Everson* rule was its effect on the states. For the first time, the Court said that whatever Congress could not do, the states could not do either.

The *Everson* Court claimed that it based its reading of the establishment clause on the intentions of the people in the First Congress.[5] Later, the Court led by Chief Justice Earl Warren reiterated this historical assertion in opinions endorsing the *Everson* rule.[6] While a number of legal scholars have supported *Everson's* reading of history,[7] the reading has not gone unchallenged. An impressive number of scholars has written in opposition to either the no-aid rule[8] or the extension of the establish-

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[5] 330 U.S. 1, 13.

[6] McGowan v. Maryland, 366 U.S. 420, 440-41, 81 S. Ct. 1101, 6 L.ed.2d 393 (1961); Engel v. Vitale, 370 U.S. 421, 425, 82 S. Ct. 1261, 8 L.ed.2d 601 (1962); Abington School District v. Schempp, 374 U.S. 203, 213-14, 83 S. Ct. 1560, 10 L.ed.2d 844 (1963).

[7] Robert G. Dixon, "Religion, Schools and the Open Society," 13 *Journal of Public Law* 267, 278 (1964); Leonard Levy, *Judgments: Essays on American Constitutional History* (New York: Quadrangle, 1972) and "School Prayers and the Founding Fathers," *Commentary*, vol. 34 (September 1962), p. 225; Leo Pfeffer, "The Case for Separation," in J. Cogley, ed., *Religion in America: Original Essays on Religion in a Free Society* (New York: Meridian, 1968), pp. 57-73.

[8] Antieau, Downey, and Roberts, *Freedom from Federal Establishment*; Edward S. Corwin, "The Supreme Court as a National School Board," 14 *Law and Contemporary Problems* 3 (1949); Lowenthal, "The Place of Religion in American Public Life: A Critique of Absolute Separatism" (Uupublished, 1969); Edward R. Norman, *The Conscience of State in North America* (London:

ment clause to the states,[9] but none has tried to interpret Lloyd's notes on a speech-by-speech basis. When we look at these notes carefully, we find that not one, but both, halves of the *Everson* rule fly in the face of the intended meaning of the establishment clause.

Amendments Proposed

The Constitution, as ratified, mentioned religion only once—in the Article VI clause prohibiting religious tests for national office. The delegates at the Philadelphia Convention thought that, since they were creating a government of limited powers, with no authority to act in matters relating to religion, no further protection was necessary. An extended, commercial republic, made up of people of all faiths, would never let the government impose a religious orthodoxy, as long as all kinds of people could be represented in the legislature.

This argument was not enough to satisfy many of those attending state ratifying conventions. Many of them were concerned that the federal government, using its constitutionally delegated powers, might pass laws indirectly affecting religion or other subjects previously reserved for the states. As a result, many of these ratifying conventions urged the national government to amend the Constitution as soon after ratification as possible. A few states specifically urged the inclusion of a

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Cambridge University Press, 1964); James M. O'Neill, *Religion and Education Under the Constitution* (New York: Harper, 1949); Charles E. Rice, *The Supreme Court and Public Prayer* (New York: Fordham, 1964).

[9] Mark DeWolfe Howe, *The Garden and the Wilderness* (Chicago: University of Chicago Press, 1965), pp. 22-23; Wilbur Katz, *Religion and the American Constitutions* (Evanston, Ill.: Northwestern University Press, 1964) and "The Case for Religious Liberty," in Cogley, ed., *Religion in America*, p. 101; Lowenthal, "The Place of Religion," p. 19; O'Neill, *Religion and Education*, p. 10; Joseph Snee, "Religious Disestablishment and the Fourteenth Amendment," 1954 *Washington University Law Quarterly* 371.

bill of rights. Virginia and North Carolina proposed identical provisions dealing with religion:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force and violence; and therefore all men have an equal, natural and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by law in preference to others.[10]

New York offered a provision similar to these,[11] while New Hampshire suggested that "Congress shall make no laws touching religion or to infringe the rights of conscience." [12]

When James Madison reworked the many amendments suggested by the states into one set of proposals to be presented to the First Congress, he revised this religion amendment and added a new one not suggested by the states that would have limited state power. The two amendments were introduced by Madison to Congress on June 7, 1789.

> The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed.[13]

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[10] J. Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 2d ed., 5 vols. (Washington, D.C., 1836), vol. 3, p. 659 (Virginia) and vol. 4, p. 1244 (North Carolina).

[11] Ibid., vol. 1, p. 328.

[12] Ibid., vol. 1, p. 362.

[13] 1 *Annals of Congress* 434 (June 8, 1789).

> No state shall violate the equal rights of conscience or the freedom of the press, or the trial by jury in criminal cases.[14]

The language used in these amendments indicates that Madison wanted to prohibit both the states and the federal government from infringing on the rights of conscience. In contrast, the establishment clause was to apply only to the federal government.

Madison's proposed amendments were referred on June 7 to the Committee of the Whole House.[15] After they sat idle for a month and a half, they were referred on July 21 to a specially formed Select Committee, of which Madison was a member.[16]

The Select Committee acted fairly quickly, reporting to the House after one week, on July 28. The committee recommended the proposal to prohibit the states from violating the equal rights of conscience, and the House passed it after little debate and only a minor modification.[17] It also recommended an amended version of the proposal limiting congressional action, but, in contrast with the limitation on state action, this proposal was debated by the First Congress at greater length than almost any other item in the Bill of Rights.

The committee version of the limitation on congressional action, which was to be changed several times during the course of the debates over the Bill of Rights, read:

> No religion shall be established by law, nor shall the equal rights of conscience be infringed.[18]

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[14] Ibid., p. 435.

[15] Ibid., p. 450.

[16] Ibid., p. 665.

[17] The House's rewording involved only a minor shift in grammar. 1 *Annals* 755.

[18] 1 *Annals* 729.

This committee version made two major changes from the original Madison proposal. First, the committee dropped the phrase "the Civil Rights of none shall be abridged on account of religious belief or worship." Since there was no committee report, any explanation of the meaning of this change must be conjectural. One plausible reason for the omission is that the phrase seems to be redundant, protecting nothing not covered either by Article VI of the original Constitution or by the other clauses of the proposed amendment.

The second committee change was the omission of the word "national" used in Madison's proposal, making the amendment read, "No religion shall be established by law." This change was more significant than the other one, but it would be best to defer an explanation of its meaning until the debate is analyzed.

Another two weeks passed between the July 28 filing of the Special Committee's report and the consideration of the Bill of Rights on the floor. In other words, more than two months elapsed between Madison's June 7 introduction of the amendments and the start of floor debate on August 15.

This waiting period may seem normal to a student of the modern Congress, who is used to seeing bills become lost in standing committees. But it was exceptional in the early Congresses, and, as the months wore on, the time element became an important factor in the political strategies of those interested in the amendments.

Anti-Federalists who had opposed the Constitution had used the lack of a bill of rights as an argument against ratification. Now, these same anti-Federalists hoped to stall the Bill of Rights and thus weaken support for the new Constitution. The tactic might have succeeded. There was a delay in assembling a quorum at the beginning of the First Congress and time was short.

Madison understood this tactic for what it was.[19] Once the amendments reached the floor, he acted forcefully to expedite debate and to arrange the compromises necessary to assure passage before adjournment.[20] Readers looking at the *Annals of Congress* for the first time have to bear this in mind as they read the Bill of Rights debate. Much of the character of the debate, as well as some specific features of the compromises made, derive directly from the tactical situation created by this time pressure.

The August 15 Debate

Debate on the Bill of Rights opened in the House on August 15, when the religion amendment received its principal consideration. The debate left many questions unanswered—one day was hardly sufficient for a matter as complex as religious disestablishment and toleration. But one day was more than the Congress spent on most other items in the Bill of Rights. After the pressure of time had become more obvious, the members accepted some of the clauses, including the free exercise clause, with little or no debate.

The August 15 speeches concentrated on the establishment question, bypassing the "rights of conscience" or

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[19] James Madison, *The Writings of James Madison*, Gaillard Hunt, ed., 9 vols. (New York: Putnam, 1900-1910), vol. 5, p. 335.

[20] See, for example, Madison to Edmund Randolph, August 21, 1789, ibid., vol. 5, pp. 417-18. A similar point about the delaying tactics of the opposition was made in a letter from John Brown to William Irvine, August 17, 1789. The letter is held in the Caryl Roberts Collection of the Irvine Papers, Historical Society of Pennsylvania. Brown wrote, "the Antis, viz, Gerry, Tucker, etc., appear determined to obstruct and embarass the business as much as possible." A similar picture of Gerry and Tucker's motives appears in a letter dated August 18, 1789, from Frederick A. Muehlenberg to Benjamin A. Rush. Copies of both letters are available in the files of the First Congress Project.

"free exercise" clause almost completely.[21] Peter Sylvester, a fifty-year-old lawyer from New York who served on the Committee of Safety in 1774, opened the debate.

Sylvester's speech indicated that he was unhappy with the language in the Select Committee's version of the establishment clause. His objection, he said, was that the particular words used could lend themselves to an unintended construction. In particular, he feared that the clause "might be thought to have a tendency to abolish religion altogether." [22]

Sylvester's objection seems a strange one. Readers trying to make sense of the debates have to ask themselves how anyone ever could think that an amendment reading "no religion shall be established by law" could be dangerous for religion. Unfortunately, Sylvester never explained his reasons.

What seems likely is that Sylvester had two premises in mind as he spoke: (1) He probably was concerned that the phrase "no religion should be established by law" could be read as a prohibition of all direct or indirect governmental assistance to religion, including land grants to church shools, such as those contained in the Northwest Ordinance, or religious tax exemptions. (2) Sylvester apparently thought some form of governmental assistance to religion was essential to religion's survival. Unless these premises are assumed, it is difficult to see how Sylvester could have seen the establishment clause as a threat to religion.

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[21] The entire debate may be found at 1 *Annals* 729-31, and is reproduced in Stokes, *Church and State*, vol. 1, pp. 541-43. Unfortunately, there seems to be some variation in the pagination of different prints of the *Annals*. In a footnote, Stokes refers to this debate as occurring on pp. 757-59, and this author has seen other numberings as well. The numbers given here seem to be the most common. Any researcher having trouble using the *Annals*, however, would be best advised to rely on dates rather than page numbers.

[22] 1 *Annals* 729.

This reading of Sylvester's statement obviously supports this author's view of the historical meaning of the establishment clause. But as convenient as it is, it involves too many assumptions to be accepted without corroboration. It is necessary, therefore, to continue reading beyond the debate's first speech.

As we continue reading, however, we discover rapidly that something said by the Massachusetts anti-Federalists leader Elbridge Gerry supports this interpretation of Sylvester's remarks. Gerry spoke after Select Committee Chairman John Vining, of Delaware, who would have reversed the order of the "rights of conscience" and "establishment" clauses as a way of showing concern for the continued existence of religion. Gerry urged the Congress to reword the amendment to read "no religious doctrine shall be established by law." [22] The effect of this would have been to prohibit the most serious form of religious establishment, the proclamation of an official credo, without prohibiting all things that might conceivably be regarded as "aids" to religion.

What did Gerry's proposal have to do with the two speeches preceding his? Gerry apparently was responding to something, rather than starting the debate anew. Gerry may have been dissatisfied with Vining's response to Sylvester's criticism of the clause. Since Gerry's alternative language would have allowed some assistance to religion, that seems to confirm our earlier reading of Sylvester.

Roger Sherman, of Connecticut, was the fourth speaker whose remarks were recorded by Lloyd. Sherman reiterated the Federalist delegated-powers argument against having any bill of rights. Sherman said that he saw no need for an amendment, since the government had no authority to pass legislation dealing with religion. Daniel Carroll, the fifth speaker, disagreed with Sherman, not

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[22] Ibid., p. 730.

because of his understanding of the powers delegated to the federal government, but because of the need for conciliating the anti-Federalists, who wanted amendments to quiet their fears about the new government's powers.

The next speaker was James Madison. Lloyd's summary of his speech reads:

> Mr. MADISON said, he apprehended the meaning of the words to be, that Congress should not establish *a* religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the constitution, and the laws under it, enabled them to make laws of such a nature as might infringe the rights of conscience and establish *a* national religion.[24]

Madison's response to Sherman in this speech is obvious and on the surface: whether the amendment really was needed or not—he privately agreed that it was not—some states wanted it. But there is another interesting aspect of this speech. In two places Madison misquoted his own proposal, adding a word to it by saying that Congress should not establish *a* religion. The additional word is significant. If it had been in the original, Sylvester would never have objected. If the added word had been in Madison's clause, it could not have been read as a prohibition of indirect, nondiscriminatory assistance to religion. To say that Congress should not establish *a* religion differs from saying it should not assist religion as such.

Benjamin Huntington, speaking after Madison, returned to this problem of the difference between the

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[24] Ibid. [Emphasis added.]

clause's language and the intentions of the members of Congress. Huntington said that he agreed with Madison about what people wanted the amendment to say. In a phrase similar to Sylvester's, however, he expressed concern "that the words might be taken in such latitude as to be extremely hurtful to the cause of religion," and he "hoped, therefore, the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all." [25] That is to say, Huntington thought the amendment should not require the government to be neutral to all differences between religion and irreligion.

Madison responded by suggesting that if the word "national" were added before the word "religion"—which would return the clause to the language he presented on June 28—the questions raised by both Sylvester and Huntington would be answered. He then indicated clearly that he accepted the Sylvester-Huntington view of what the clause should be saying, by stating its most important purpose in this way:

> Madison believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought that if the word national was introduced, it would point the amendment directly to the object it was intended to prevent.[26]

Up to this point in the debate, everyone seemed agreed on what they wanted the amendment to say. The major disagreement was over the language reported by the committee, and whether it could be misconstrued to mean something other than what was intended. All of the

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[25] Ibid., 730-31.

[26] Ibid., p. 731.

speakers, except Sherman, agreed that the Bill of Rights should prohibit the new government from establishing a national religion. In addition, they did not want the government to have the power deliberately to favor one religion over another. But every one of them also seemed to agree that the Bill of Rights should not prevent the federal government from giving nondiscriminatory assistance to religion, as long as the assistance is incidental to the performance of a power delegated to the government. Both Sylvester and Huntington thought that the failure to extend this kind of assistance would be the equivalent of active hostility to religion. Madison, even though he privately questioned the efficacy of governmental assistance to religion, accepted the Sylvester-Huntington view throughout the First Congress debates.

A new element was added to the debate immediately after Madison's speech urging the addition of the word "national." Samuel Livermore, of New Hampshire, objected to the rewording and offered in its place the language proposed by the New Hampshire ratifying convention: "Congress shall make no laws *touching* religion, or infringing the rights of conscience."[27] This was the first statement in the debates which, if taken out of context, could conceivably be used to support the modern Supreme Court's "no aid to religion" interpretation of the establishment clause. But Livermore's silence on the agreement between Sylvester, Huntington, and Madison on indirect nondiscriminatory assistance suggests that what he wanted had little to do with the aid/no aid issue. This is confirmed by the character of the arguments used by Elbridge Gerry to support Livermore.

Gerry, speaking next, immediately connected Livermore's proposed language to Madison's use of the word "national." Gerry objected to Madison's choice of language because it implied that the Constitution created

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[27] Ibid. [Emphasis added.]

one nation, with a national government, instead of a union of states ruled by a federal government with limited powers. He principally was concerned, in other words, with the symbolic importance of putting the word "national" in our fundamental legal document, a word which the 1787 Convention carefully left out of the original Constitution when referring to the government of the United States. Gerry's concern with the relationship between the federal and state governments, expressed here during the establishment clause debate, was a consistent theme raised by Gerry during the First Congress, as it had been during the Constitutional Convention.

The Select Committee's version of the establishment clause—with its deletion of the word "national" from Madison's original proposal—would have satisfied this objection of Gerry's, but the committee version was too ambiguous on other grounds. Gerry supported Livermore because Livermore went even further than the committee did toward satisfying Gerry's concern over the nation/state issue. Livermore's suggested prohibition of any federal law "touching" religion differed in two ways from the versions of the clause discussed until then. (1) Livermore's language apparently would have prohibited any form of federal aid to religion, including nondiscriminatory aid offered to achieve a properly delegated end. However, this would not have led to the destruction of religion that Sylvester and Huntington feared, because Livermore's language reaffirmed the power of the states to aid religion as they saw fit. (2) Indeed, state power would have been enhanced. The Federalist interpretation of "necessary and proper" was consistent with permitting federal laws to affect state establishments indirectly, as long as Congress was trying to achieve something it had the power to accomplish. Livermore would have prevented this, and thereby could have raised havoc with the powers of the new federal government. It was precisely for this reason that Gerry, ever watchful of the new government's power, supported Livermore.

Livermore and Gerry had struck a responsive chord, and Madison knew it. He spoke right after Gerry to deny that his insertion of the word "national" was meant to have any symbolic importance, and he withdrew his motion to include the word. But the damage to the Federalist position had been done, at least for that day. The Select Committee's language, which had been neutral on the nation/state issue, was defeated 31-20 by the anti-Federalist Livermore proposal.

The August 20 Reconsideration

The August 15 debate was the only one recorded on either of the religion clauses. But the conclusion of public debate did not put an end to the changes the members of the First Congress made in the wording of the amendment.

On August 20, Fisher Ames, of Massachusetts, suggested that the establishment clause should be returned to the Select Committee's version. His proposal also marked the first congressional appearance of the free exercise clause as we know it.

> Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.[28]

If the interpretation given here of the Livermore amendment is correct, the Ames version of the establishment clause represented a return to a compromise position on the nation/state issue: while there were no claims that United States was one "nation," neither were there any positive assurances that Congress would not do anything that touched the state religious establishments. This compromise, however, was not to be the last word on the nation/state issue.

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[28] 1 *Annals* 766 (August 20, 1789).

Ames's addition of the free exercise clause obviously was important, but because the *Annals* do not report any speeches on the proposal, it is difficult to determine its meaning. What was the relationship between the "free exercise" and the "rights of conscience" clauses in Ames's proposal? Were they redundant? Was the phrase "free *exercise*" meant to suggest that something more than rights of conscience or belief were to be protected? If so, what did the word "exercise" mean? Since Madison did use the word "worship" in his first version of the religion clauses, did "exercise" refer to the utterance and expression of belief through worship? If so, was the idea of worship understood to be limited to traditional modes of public, congregational prayer, or were other forms of expressive activity and/or religiously motivated behavior to be protected as well? Without any legislative record it is impossible to answer these questions without referring to noncongressional contemporary sources. We shall turn to these later.

Although there was no floor debate on Ames's motion, there must have been considerable discussion of it off stage before it was introduced. The House accepted the motion of August 21, with no apparent controversy or counterproposal. On August 24, after some minor stylistic revision, the House sent the Ames's version to the Senate as its final version of the religion amendment.[29]

Senate Action

The principal Senate debate on the amendment apparently took place on September 3. We have to say "apparently" because Senate floor debates during the early Congresses were kept secret.

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[29] 1 *Annals* 779. For receipt by the Senate, see Journal of the First Session of the Senate, p. 60 (August 25, 1789). [Hereinafter cited as 1 S. Jour.]

The Ames amendment must have provoked controversy in the Senate, since several alternative versions were suggested in its place. The votes on these seem to have been close, because competing versions were passed and then defeated again in fairly rapid order. Unfortunately, the *Senate Journal* does not even give us vote divisions; all we are told is whether a given motion passed or was defeated.

The first substitute amendment to be offered in the Senate on September 3 read as follows:

> Congress shall make no law establishing one religious sect or society in preference to others, or to infringe on the rights of conscience.[30]

This version dropped the free exercise clause, while it made the establishment clause completely unambiguous on the permissibility of non-discriminatory aid. It was defeated at first, but then was accepted by the Senate after reconsideration. But that did not end the matter. After the Senate rejected a motion offered on that same day to eliminate the religion amendment entirely, it then rejected two versions of the amendment that were similar to the one they had just accepted. The two defeated amendments read:

> Congress shall not make any law infringing the rights of conscience, or establishing any religious sect or society.[31]

> Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.[32]

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[30] Ibid., p. 70.

[31] Ibid.

[32] Ibid.

The parliamentary status of the version that had passed earlier in the day is left mysterious by the *Journal*. But whatever its status, the succession of amendments offered makes it clear that both the wording of the establishment clause and the very presence of the free exercise clause were being debated. The Senate ended the day by accepting most of the Ames version, after striking the seemingly redundant clause, "nor shall the equal rights of conscience be infringed." At the end of September 3, the Senate version of the amendment read:

> Congress shall make no law establishing religion, or prohibiting the free exercise thereof.[33]

This did not satisfy some senators, who wanted to spell out the particular relationships between government and religion that they considered to be establishments. On September 9, the Senate embodied these concerns in the narrowest version of the amendment we have seen so far:

> Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion.[34]

This was the religion amendment that the Senate sent back to the House.

The Meaning of the Final Language

The House refused to accept the Senate's changes in the Bill of Rights and asked for a conference.[35] The *Annals* do not give the House's reasons for rejecting the Senate's version of the religion amendment, but reasons come to mind readily. Madison's understanding of the kinds of

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[33] Ibid.

[34] Ibid., p. 77 (September 9, 1789). The Senate defeated the amendment that would have prohibited the states from infringing on the rights of conscience. Ibid., p. 72 (September 7, 1789).

[35] Ibid., pp. 77-78.

governmental activities that should be prohibited was much broader than the understanding implied by the Senate amendment. At least part of Madison's broader conception was accepted by most members of the House.

The conference committee for the Bill of Rights was a strong one, composed of Representatives James Madison (Va.), Roger Sherman (Conn.), and John Vining (Del.), chairman of the House's Select Committee, and Senators Oliver Ellsworth (Conn.), Charles Carroll (Md.), and William Paterson (N.J.).[36] The House members seem to have had their way on the religion amendment. The version that came out of the conference was essentially the Ames version with one significant alteration:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The conference committee's language was accepted by the House on September 24,[37] and by the Senate on September 25.[38]

The final wording of the amendment embodied key compromises on both the nation/state and the aid/no aid issues, compromises which were made possible by the more important underlying agreement on the need to pass a bill of rights before time pressures made passage that year impossible. The most important compromise on the aid/no aid issue involved the use of the word "establishment" without such qualifying phrases as "religious doctrine" or "articles of faith." This formulation satisfied Madison's desire to prohibit indirect forms of discriminatory religious assistance as well as the direct establishment of a national church. At the same

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[36] Stokes, *Church and State*, vol. 1, pp. 546-47.

[37] 1 *Annals* 913 (September 24, 1789).

[38] 1 S. Jour. 88 (September 25, 1789).

time, the phrase "an establishment" seems to ensure the legality of nondiscriminatory religious aid. Had the framers prohibited "*the* establishment of religion," which would have emphasized the generic word "religion," there might have been some reason for thinking they wanted to prohibit all official preferences of religion over irreligion. But by choosing "an establishment" over "the establishment," they were showing that they wanted to prohibit only those official activities that tended to promote the interests of one or another particular sect.

Thus, through the choice of "an" over "the," the conferees indicated their intent. The First Congress did not expect the Bill of Rights to be inconsistent with the Northwest Ordinance of 1787, which the Congress reenacted in 1789. One key clause in the Ordinance explained why Congress chose to set aside some of the federal lands in the territory for schools: "Religion, morality, and knowledge," the clause read, "being necessary to good government and the happiness of mankind, schools and the means of learning shall forever be encouraged."[39] This clause clearly implies that schools, which were to be built on federal lands with federal assistance, were expected to promote religion as well as morality. In fact, most schools at this time were church-run sectarian schools.

The conference committee's language indicates that, in addition to the problem of nondiscriminatory aid, committee members also were deeply concerned about the nation/state issue. This concern seems to have been reflected in the specific language they choose to insert, "no law *respecting* an establishment of religion."

Most commentators assume that the word "respecting" is synonymous with "tending toward." Thus, they read the clause as if it prohibits Congress from passing any law that tends to establish a religion. These commenta-

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[39] 1 Stat. 50, 52 (1789), Art. III.

tors are only partly right. If this were all the conferees cared about, they could have handled the matter much more directly than they did. But what the conferees—or at least the House conferees—needed was language that would serve two purposes at once. To be sure, they wanted to prohibit laws that tended to establish a religion. But they also wanted language that would satisfy the nation/state concerns of such people as Elbridge Gerry and Samuel Livermore.

The language the conferees chose does serve both parts of this dual purpose. It not only prohibits laws which "tend to" establish a religion; it also prohibits Congress from passing laws" with respect to" an establishment of religion. In other words, it prohibits Congress from passing any law that would affect the religious establishments in the states.[40] This was designed to satisfy people from states, such as Massachusetts, that did have established churches. The conference committee's version did not go as far on this point as the proposal offered in the House by Livermore and Gerry on August 15, and that may help to explain why both men finally voted against the amendment when it was accepted by the House on September 24 by a vote of 35-14.[41] But the conference version was a compromise between the Ames version of August 20 and the more anti-Federalist Livermore version. Since the Ames version originally represented a compromise between the more nationalist Madison version and the Livermore proposal, the final version apparently went more than halfway in a vain effort to win the support of the anti-Federalists.

Most scholars who have written on the establishment clause fail to see this dual purpose because they underestimate the importance of the nation/state issue for the

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[40] Lowenthal noted the dual purpose of this language in "The Place of Religion," p. 19.

[41] 1 *Annals* 913 (September 24, 1789).

members of the First Congress. But, according to the only comprehensive study of that Congress written by a historian who used the First Congress Project's materials, federalism was *the* overriding issue throughout the Congress.[42] There should be no surprise, therefore, about its importance here.

Thus, the records available to us demonstrate that the establishment clause was meant to have two major purposes:

(1) It prohibited the federal government from giving any aid to religion if the aid in question could *tend to* establish *a* religion. This prohibition was broader than either Gerry's "no religious doctrine" or the Senate's "no religious sect or society" formulas, but it was not so broad as to forbid such forms of nondiscriminatory assistance to religion as were found in the Northwest Ordinance.

(2) At the same time, the clause prohibited Congress from tampering with the state religious establishments. This prohibition was not so broad as it would have been under Livermore's proposal but it represented a more explicit guarantee to the states than anything in Madison's original package of amendments.

There remains one more difficult problem of interpretation. The legislative history of the establishment clause shows that the framers accepted nondiscriminatory aid to religion. Yet many writers, knowing Madison wanted to prohibit even this much, have used Madison's views stated elsewhere to support a strict separationist position. If these other writers are correct about Madison (and we know he did oppose Virginia tax benefits distributed to all churches), what can explain his willingness to go along with something different in the First Congress? The answer is twofold.

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[42] Kenneth R. Bowling, *Politics in the First Congress, 1789-1791* (University of Wisconsin: Ph.D. diss., 1968).

(1) He needed the votes to defeat Gerry's attempts during the summer of 1789 to delay the Bill of Rights, and he needed the Bill of Rights to achieve what was to him a more important goal than the exact wording of the establishment clause—public support for the new Constitution.

(2) Madison felt all along the First Amendment was unnecessary. He thought a modern extended republic would breed such a multiplicity of sects as to make establishment unlikely even without an amendment. Once amendment became politically desirable, he was willing to accept nondiscriminatory aid instead of strict separation. But the aid would be circumscribed very narrowly. It had to be given in pursuit of a legislative end specified in the Constitution, and it could not discriminate among sects. Together, these requirements would produce practical results only slightly different from the ones that would flow from his preferred notion of separation. All that would be needed was a strict enforcement of nondiscrimination. Even in Madison's day, nondiscrimination would have required one to consider Jefferson's marginally Christian deism as a religion. Today, we also would have to include Muslims, Buddhists, and other sects outside the Judaeo-Christian tradition. Thus, the compromise he agreed to would have permitted aid to private schools but not any of the practices he thought dangerous.

What should be emphasized here is the broad area of agreement between Madison and the others in the First Congress. They all wanted religion to flourish, but they all wanted a secular government. They all thought a multiplicity of sects would help prevent domination by any one sect. All of them also thought religion was useful, perhaps even necessary, for teaching morality. They all thought a free republic needed citizens who had a moral education. They all thought the primary responsibility for this education lay with the states. And they

all agreed that Article I gave Congress no direct power to deal with the subject. The disagreement was over what Congress should be allowed to do pursuant to some other delegated power. Sylvester and those who agreed with him feared that religion would be hurt if Congress were not allowed to prefer religion over irreligion in otherwise valid laws. Madison, in forms outside the First Congress, thought religion would flourish best if it were left alone, in a strict policy of separation. But he saw no harm in compromising with Sylvester, so he did.[43]

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[43] These strands have been overlooked in the current debate over establishment for reasons largely having to do with the federalism issue. Some current writers believe the Civil War and Fourteenth Amendments so transformed the nation/state issue as to make readings based on 1789 desires to accommodate the anti-Federalists irrelevant. There are two answers to this.

(1) Before one assumes that the Fourteenth Amendment prohibits any state aid to religious organizations, one should be aware that the generation that adopted it thought yet another amendment (the "Blaine Amendment") would have been needed to achieve this. The amendment was passed by the House on August 4, 1876, but fell short of the necessary two-thirds in the Senate. The version introduced in the Senate on August 14, 1876 said, in part: "No state shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any State. . . . No. . . . appropriation or loan of credit shall be made to any religious or anti-religious sect. . . . This article shall not be construed to prohibit the reading of the bible in any school or institution; and it shall not have the effect to impair the rights of property already vested." C. Moehlman, *The American Constitutions and Religion, Religious References in the Charters of the Thirteen Colonies and the Constitutions of the Forty-Eight States: A Sourcebook on Church and State in the United States* (Berne, Ind., 1938), p. 17.

(2) More important, suppose one adopts the post-1937 notion (in Palko v. Connecticut 302 U.S. 319, 58 S. Ct. 149, 82 L.ed. 288) that the concept of "ordered liberty" in the due process clause now requires the states to adhere to the establishment clause? Even so, one should not ignore the federalism portion of the original establishment clause, as the *Everson* Court did in 1947. Ignoring it affects the way one looks on the controversy over nondiscrimina-

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tory aid. If one tries to read the language in the establishment clause without its federalism context, a "no-aid" reading comes almost naturally. Understanding the federalism background helps clarify why the framers used the strange wording they did in a clause meant to permit nondiscriminatory aid.

SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION

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Chapter One

THE GENESIS OF THE ESTABLISHMENT OF RELIGION CLAUSE

* * * *

From the above documentation, I conclude that, regarding religion, the First Amendment was intended to accomplish three purposes. First, it was intended to prevent the establishment of a national church or religion, or the giving of any religious sect or denomination a preferred status. Second, it was designed to safeguard the right of freedom of conscience in religious beliefs against invasion solely by the national Government. Third, it was so constructed in order to allow the States, unimpeded, to deal with religious establishments and aid to religious institutions as they saw fit. There appears to be no historical evidence that the First Amendment was intended to preclude Federal governmental aid to religion when it was provided on a nondiscriminatory basis. Nor does there appear to be any historical evidence that the First Amendment was intended to provide an *absolute separation or independence* of religion and the national state. The actions of the early Congresses and Presidents, in fact, suggest quite the opposite.

Chapter Two

RESURRECTING MADISON AND JEFFERSON

* * * *

The thesis advanced in chapter one concerning a narrower interpretation of the Establishment of Religion Clause of the First Amendment has been endorsed by a number of distinguished scholars. Besides James Madison, the State ratifiers of the Federal *Constitution*, Justice Joseph Story, and Thomas Cooley in the eighteenth and nineteenth centuries, to that list can be added the names of such noted twentieth-century constitutional scholars as Edward S. Corwin and Alexander Meiklejohn.[1] Corwin's article "The Supreme Court as National

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[1] The late Edward S. Corwin was McCormick Professor of Jurisprudence, Princeton University, until his retirement in 1946. See

School Board," draws attention to J.M. O'Neill's book *Religion and Education Under the Constitution*,[2] which Corwin calls "a devastating assault upon the *McCollum* decision"—a 1948 U.S. Supreme Court decision discussed in detail in chapter five.[3] Indeed the O'Neill book is a devastating assault not only on *McCollum* but also on the broad interpretation given to the prohibition of the Establishment of Religion Clause by all the opinions in the *Everson* "Bus Case" of 1947[4]—the first case in which the United States Supreme Court advanced a comprehensive interpretation of the Establishment Clause.[5]

The meaning of the Establishment of Religion Clause developed in chapter one has been rejected as a narrow interpretation by the Supreme Court and by many prominent scholars, but none more pre-eminent in writing about the separation of Church and State, than Professor Leo Pfeffer, who has been referred to by the monthly periodical *Church and State* as "the country's leading legal expert on church-state questions. . . ."[6]

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his article, "The Supreme Court as National School Board," 14 *Law and Contemporary Problems* 3 (1949). The late Alexander Meiklejohn was most noted in the fields of logic, philosophy, and his writings on the First Amendment, among which were *Free Speech and Its Relation to Self-Government* (New York: Harper and Row, 1948), and "The First Amendment is an Absolute," Philip B. Kurland, ed., *The Supreme Court Review, 1961* (Chicago: University of Chicago Press, 1961), pp. 245-266. See his article, "Educational Cooperation between Church and State," 14 *Law and Contemporary Problems* 61 (1949).

[2] (New York: Harper Brothers, 1949). O'Neill's book was more recently reprinted without change, by Da Capo Press in 1972.

[3] Corwin, *Law and Contemporary Problems*, p. 14, fn. 44.

[4] *Everson v. Bd. of Education*, 330 U.S. 1 (1947).

[5] Because it is the precedent case interpreting the Establishment Clause, the major opinions in *Everson v. Bd. of Education* will be analyzed in chap. five.

[6] *Church and State*, Vol. 30, No. 10 (October 1977), p. 10 (202). It should be noted that Professor Pfeffer has written many books

In appraising what Madison believed was constitutional in matters of Church and State *when he was President*, it should be remembered that a request from Congress, by joint resolution, asking that a Presidential Proclamation be issued concerning a day of "Thanksgiving" and "Prayer" is a legislative act that is not binding on the President. If Congress had by law created a national holiday through appropriate constitutional legislative process—either with the President's concurrence or by overriding his veto—then presidential discretion would not have been involved. But in all of Madison's Thanksgiving Proclamations this was clearly not the case. In short, Madison as President received from Congress joint resolutions requesting the proclamations declaring the days of "Thanksgiving and Prayer" and on four separate occasions issued Presidential Proclamations which were *purely discretionary* executive acts. In no instance was he compelled by law to issue them. If Madison's heart—let alone his principles—had not been in his declaration of the days of "Thanksgiving," then the very texts of his presidential proclamations indict him as a man of little or no scruples on the matter. Consider Madison's Thanksgiving Day Proclamation of March 4, 1815:

> By the President of the United States of America.
>
> A Proclamation.
>
> The Senate and House of Representatives of the United States have by a joint resolution signified their desire that a day may be recommended to be

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on American Constitutional Law, including *The Liberties of An American* (Boston: Beacon Press, 1956); *This Honorable Court* (Boston: Beacon Press, 1965); with Anson Phelps Stokes, *Church and State in the United States* (New York: Harper and Row, 1950); *God, Caesar, and The Constitution* (Boston: Beacon Press, 1975); and *Church, State, and Freedom* (Boston: Beacon Press, 1953). Pfeffer has also actively participated in the litigation of more than one half of all the Establishment Clause cases decided by the United States Supreme Court since the *Everson* Case of 1947.

observed by the people of the United States *with religious solemnity as a day of thanksgiving and of devout acknowledgements of Almight God for His great goodness* manifested in restoring to them the blessing of peace.

No people ought to feel greater obligations *to celebrate the goodness of the Great Disposer of Events* and of the Destiny of Nations than the people of the United States. *His kind providence* originally conducted them to one of the best portions of the dwelling place allotted for the great family of the human race. *He protected and cherished them* under all the difficulties and trials to which they were exposed in their early days. *Under His fostering care* their habits, their sentiments, and their pursuits prepared them for a transition in due time to a state of independence and self-government. In the arduous struggle by which it was attained they were distinguished by multiplied tokens of *His benign interposition.* During the interval which succeeded He reared them into the strength and endowed them with the resources which have enabled them to assert their national rights and to enhance their national character in another arduous conflict, which is now so happily terminated by a peace and reconciliation with those who have been our enemies. *And to the same Divine Author of Every Good and Perfect Gift we are indebted for all those privileges and advantages, religious as well as civil, which are so richly enjoyed in this favored land.*

It is for blessings such as these, and more especially for the restoration of the blessing of peace, that I now recommend that the second Thursday in April next be set apart as a day on which the people of every religious denomination may in their solemn assemblies unite their hearts and their voices in a freewill offering *to their Heavenly Benefactor of*

their homage of thanksgiving and of their songs of praise.

Given at the city of Washington on the 4th day of March, A.D. 1815, and of the Independence of the United States the thirty-ninth.

JAMES MADISON [63]

The actions of Madison in the House of Representatives and the White House and some of his private correspondence upon leaving the Presidency, in comparison with the statements in the "Detached Memoranda," suggest that in his discussion of monopolies—the central theme of the "Memoranda" [64]—Madison out of office and as an old man regretted some of his past public actions.

Whereas Pfeffer rests his argument about chaplains in Congress and Thanksgiving Proclamations on one document written in Madison's declining years, I think that Madison should be judged on his behavior, statements, and actions *while he was a public servant in the House and in the Presidency making policy and accountable for it.* An analogous contemporary illustration should make my point. If former President Nixon, reflecting on his tenure as President, in his final years were to publish a book in which he unequivocally wrote that: "Taping conversations, without all parties being aware of the recording, is morally wrong and clearly a flagrant violation of the constitutional right of privacy," then in my judgment, it would be absurd—for any future biographer or

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[63] James D. Richardson, *A Compilation of the Messages and Papers of the Presidents, 1789-1897,* Vol. I (Washington, D.C.: Bureau of National Literature and Art, 1901), pp. 560-61. Emphasis added. Madison's "Thanksgiving Proclamations" of July 9, 1812; July 23, 1813; and November 16, 1814 are republished in the Addenda and taken from the same source.

[64] Fleet, "Madison's 'Detached Memoranda'," see especially the general discussion on "Banks," pp. 548-50, and the section on "Monopolies" of various kinds, including "Ecclesiastical Endowments," beginning on p. 551.

analyst evaluating Mr. Nixon as President—to write that: "Richard Nixon believed that surreptitious tapings of conversations in the Oval Office were immoral and unconstitutional." Indeed, the "Detached Memoranda" is appropriately named, for it reflects ideas certainly "detached" from views Madison expounded in the Congress and the White House. While "foolish consistency" may indeed be "the hobgoblin of little minds," the repudiation of one's actions taken when in public power, by an elderly statesman out of power, is hardly a solid base upon which to build a convincing historical argument, much less constitutional law. Obviously the Madison of the "Detached Memorada" is not the Madison responsible for the First Amendment nor the President who issued Proclamations of days of Thanksgiving and Prayer. One cannot in good conscience and dispassionate scholarship make consistent—the inconsistent.

The Quest for Mr. Jefferson

If there is one of the Founders of the Republic who justly ranks above James Madison in the cause of religious disestablishment, it must be Thomas Jefferson. So proud was Jefferson of the victory disestablishing the Episcopal Church in Virginia that he authorized his "Virginia Statute of Religious Liberty of 1786" to be listed on his tombstone along with two other deeds for which he wanted to be remembered: "Author of the Declaration of American Independence" and "Father of the University of Virginia." [65] No mention is made that he was, among other things, the third President of the United States.

That Mr. Jefferson favored the separation of Church and State is not questioned here, but whether Pfeffer and other scholars of the "broad interpretation" of the Establishment of Religion Clause read Jefferson correctly as to

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[65] Saul K. Padover, *The Complete Jefferson* (Freeport, N.Y.: Books for Libraries Press, 1969); p. 1300.

what he meant and subscribed to as "separation of Church and State" *is very much in dispute here.* As with Madison, it seems clear to me that the interpretation which I ascribe to the religious prohibitions of the Establishment Clause—a view which Pfeffer labels "narrow" —is more consistent with Jefferson's ideas and actions than are those who subscribe to Pfeffer's "broad" interpretive approach.

* * * *

In his "Third Annual Message," to the Senate and House of Representatives on October 17, 1803, President Jefferson indicated that the "friendly tribe of Kaskaskia Indians . . . has transferred its country to the United States, reserving only for its members what is sufficient to maintain them in an agricultural way." [69] Following this message on October 31, 1803, Jefferson asked the Senate to advise and consent to the treaty mentioned in this message: [70]

> I now lay before you the treaty mentioned in my general message at the opening of the session as having been concluded with the Kaskaskia Indians for the transfer of their country to us under *certain reservations and conditions.*[71]

Although Pfeffer has commented that "direct grants of money or property to institutions exclusively devoted to worship, *such as churches*, are rare, *and their unconstitutionality is clear,*" [72] President Jefferson asked the Senate to ratify a treaty in which one of the conditions was the use of federal money to support a Catholic priest in his priestly duties, and further to provide money to build a

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[69] Richardson, *A Compilation of Messages*, Vol. I, p. 359.

[70] Ibid., p. 363.

[71] Ibid. Emphasis added.

[72] Pfeffer, *Church, State, and Freedom*, p. 196. Emphasis added.

church.[73] The Third Article of the treaty in part provided:

> *And whereas, The greater part of the said tribe have been baptised and received into the Catholic church to which they are much attached, the United States will give annually for seven years one hundred dollars towards the support of a priest of that religion, who will engage to perform for the said tribe the duties of his office and also to instruct as many of their children as possible in the rudiments of literature. And the United States will further give the sum of three hundred dollars to assist the said tribe in the erection of a church.* The stipulations made in this and the preceding article, together with the sum of five hundred and eighty dollars, which is now paid or assured to be paid for the said tribe for the purpose of procuring some necessary articles, and to relieve them from debts which they have heretofore contracted, is considered as a full and ample compensation for the relinquishment made to the United States in the first article.[74]

The Proclamation of the Ratified Treaty was issued on December 23, 1803,[75] approximately one month after Jefferson laid it before both Houses of Congress "in their legislative capacity" on November 25, 1803, presumably for the appropriation of necessary funds to execute the treaty commitments.[76]

Lest it be argued to the contrary, if Jefferson had thought the "Kaskaskia Priest-Church Treaty Provision" was unconstitutional, he could have followed other alter-

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[73] Richard Peters, Esq., ed., *The Public Statutes at Large of the United States of America*, Vol. VII (Boston: Charles C. Little and James Brown, 1848), pp. 78-79.

[74] Ibid., p. 79. Emphasis added.

[75] Ibid., p. 78.

[76] Richardson, *A Compilation of the Messages*, Vol. I, p. 365.

natives. An unspecified lump sum of money could have been put into the Kaskaskia treaty together with another provision for an annual unspecified stipend with which the Indians could have built their church and paid their priest. Such unspecified sums and annual stipends were not uncommon and were provided for in at least two other Indian treaties made during the Jefferson Administration—one with the Wyandots and other tribes, proclaimed April 24, 1806,[77] and another with the Cherokee nation, proclaimed May 23, 1807.[78]

Furthermore, if Jefferson had had doubts about violating any part of the *Constitution*, including the First Amendment, he certainly must have been aware that under Article VI of the Federal *Constitution*, "all treaties made or which shall be made under the authority of the United States" are listed third as the "Supreme Law of the Land"—the *Constitution* itself having primacy[79]—and that consequently the treaty would be unconstitutional. The conclusion seems inescapable that Pfeffer's version of Jefferson surely would not have used his constitutional prerogatives to submit, sign, request, and spend federal monies for a treaty that hardly reflects "the principle of complete independence of religion and government."

* * * *

. . . .

After the adoption of the Federal *Constitution* in 1788 and the addition in 1791 of the First Amendment with

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[77] Peters, *Public Statutes at Large*, Vol. VII, "Treaty with the Wyandots, etc.," 1805, Art. IV, p. 88.

[78] Ibid., "Treaty with the Cherokees," 1806, Art. II, p. 102.

[79] In *Reid v. Covert*, 354 U.S. 1 (1957), although there was no opinion of the Court, the judgment of the Court, announced by Justice Black, indicated that "[N]o agreement with a foreign nation can confer power on the Congress, or any other branch of Government, which is free from the restraints of the Constitution." Id. at 16. On this point it appears his view was not challenged by the other opinions.

its Establishment of Religion Clause, the Fourth Congress in 1796 enacted at least two "Land Statutes." . . . The second law, approved June 1, 1796 and entitled "An Act regulating *the grants of land* appropriated for Military services and for the Society of the United Brethren, for propagating the Gospel among the Heathen," was distinctly different.[93] Like the preceding Federal statute, this one detailed the lands to be granted; Section Two, however, provided, in part, that "the patents for all lands located under the authority of this act, shall be granted . . . *without requiring any fee therefor.*" [94] Section Five of the law provides that:

> And be it further enacted, That the said surveyor general be, and he is hereby, required to cause to be surveyed there several tracts of land, containing four thousand acres each, at Shoenbrun, Gnadenhutten, and Salem; being the tracts formerly set apart, by an ordinance of Congress of the third of September, one thousand seven hundred and eighty-eight, *for the society of United Brethren for propagating the gospel among the heathen*; and to issue a patent or patents for the said three tracts to the said society, in trust, for the uses and purposes in the said ordinance set forth.[95]

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[93] Ibid., Chap. 46, pp. 490-91. Emphasis added.

[94] Ibid., p. 491. Emphasis added. In *Church, State, and Freedom*, Pfeffer is careful to point out that after the new Federal Congress reenacted the *Northwest Ordinance*, *Public Statutes at Large*, Vol. I, First Congress, Sess. I, Chap. 8, August 7, 1789, p. 50, "no tracts of land for the support of religion" were granted under the Ordinance after the *Constitution* and the First Amendment were adopted. Pfeffer, *op. cit.*, p. 121. While this may be true, Professor Pfeffer neglects to mention the new Federal statutes under discussion here which clearly document that, after the adoption of both the *Constitution* and the First Amendment, Congress did provide "land for the support of religion."

[95] *Public Statutes at Large*, Vol. I, "Acts of the Fourth Congress," Sess. I, chap. 46, p. 491. Emphasis added.

As is evident from its name, this Society was concerned with more than merely controlling and using land set aside, in trust, for the Indians who were already Christians. In addition to exercising their trust in the interest of the Christian Indians living on portions of this land, the Society used some of the resources derived from the cultivation of these lands, and land leases sold to white tenant farmers, to convert souls "from among the neighboring heathen" and to send out missionaries to proselytize.[96]

* * * *

The Seventh Congress extended the life of the Statute twice. On April 26, 1802, the new cutoff date was set at January 1, 1803.[103] On March 3, 1803, the Congress passed "An Act to revive and continue in force, an act in addition to an act intituled etc." which was to continue in force until April 1, 1804.[104] Before the April 1, 1804 deadline, however, the Eighth Congress, on March 19, 1804, extended the 1796 Law, as amended, until April 1, 1805. This, the last renewal, had a new statutory name: "An Act granting further time for locating military land warrants, and for other purposes."[105] The "other pur-

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[96] *American State Papers*, Class II, *Indian Affairs*, Volume II, *Documents, Legislative and Executive, of the Congress of the United States*, 17th Congress, 2d. Session, Document No. 189, "Progress of the Society of United Brethren In Propagating the Gospel Among the Indians," pp. 376-77.

[103] Ibid., Vol. II, "Acts of the Seventh Congress," Sess. I, Chap. 30, pp. 155-56.

[104] Ibid., Vol. II, "Acts of the Seventh Congress," "An Act to revive and continue in force, an act in addition to an act intituled 'An Act in addition to an act regulating grants of land appropriated for Military Services and for the Society of the United Brethren for propagating the Gospel among the Heathen,' and for other purposes," Sess. II, Chap. 30, pp. 236-37.

[105] Ibid., Vol. II, "Acts of the Eighth Congress," Sess. I, Chap. 26, pp. 271-72.

poses" were in part the propagating of "the gospel among the heathen." [106] The text of the last "revival" reads:

> Chap. XXVI.—An Act granting further time for locating military land warrants, and for other purposes.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act intituled "An Act in addition to an act, intituled An act in addition to an act regulating *the grants of land appropriated for military services, and for the society of the United Brethren for propagating the gospel among the heathen,*" approved the twenty-sixth day of April, eighteen hundred and two, be, and the same *is hereby revived and continued in force,* until the first day of April, one thousand eight hundred and five: Provided, however, that the holders or proprietors of warrants or registered certificates, shall and may locate the same, only on any unlocated parts of the fifty quarter townships, and the fractional quarter townships, which had been reserved for original holders, by virtue of the fifth section of an act, intituled "An act in addition to an act, intituled An act regulating *the grants of land* appropriated for military services, and for *the society of the United Brethren for propagating the gospel among the heathen*:" And provided also, that no holder or proprietor of warrants or registered certificates, shall be permitted to locate the same by virtue of this act, unless the Secretary of War shall have made an endorsement on such warrant or registered certificate, certifying that no warrant has been issued for the same claim to military bounty land, and by virtue of the second section of the act, intituled "*An act to revive and continue in force an act in addi-*

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[106] Ibid., p. 271.

tion to an act intituled An act in addition to an act regulating the grants of land appropriated for military services, and for the society of the United Brethren for propagating the gospel among the heathen, and for other purposes," approved the third day of March, eighteen hundred and three.

Approved, March 19, 1804.[107]

Thomas Jefferson, who was President of the United States during the terms of the Seventh and Eighth Congresses, vetoed not one of the last three extensions of this Act. Like Washington and Adams had done before him, Jefferson signed them into law. Certainly Jefferson, who did not issue Thanksgiving Day Proclamations because he thought that they conflicted with the Establishment Clause's limitations on the Federal Government, would have vetoed these Acts if he had believed that they violated the First Amendment. Pfeffer's suggestion that in "his adult life Jefferson never swerved from his devotion to the principle of complete independence of religion and government" is not borne out by historical evidence.[108] This does not mean that Jefferson violated the First Amendment by signing these Acts of Congress. These historical facts indicate that Jefferson, unlike Pfeffer, *did not see the First Amendment and the Establishment Clause requiring a "complete independence of religion and government."* To conclude otherwise is to virtually force us to imply—if not to state outright—that either Jefferson was not an "adult" when in the White House or that he not only "swerved" from his principles concerning Church and State, in these instances he completely ignored them. Just as a Jefferson without deep convictions about the relationship between government and religion is incompatible with the author of the "Virginia Statute of Religious Liberty," so is Pfeffer's view

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[107] Ibid., pp. 271-72. Emphasis added.

[108] Pfeffer, *Church, State, and Freedom*, p. 105.

of Jefferson's principles concerning the relationship between Church and State irreconcilable with Jefferson's treaty provision to build a church and support a priest, as well as signing federal land grants being given in trust to a religious society for the purpose of preaching the Gospel to the Indians. From these instances alone, it seems irrefutable that Professor Pfeffer's Jefferson was not the third President of the United States.

* * * *

In order to illustrate the enormity of [Pfeffer's] error on this historical point, however, a few of the many official United States reports pertaining to this matter are reproduced here as documentation of my preceding statements.

* * * *

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Nos. 83-812 and 83-929

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WALLACE, *et al.*,
Appellants
v.
JAFFREE, *et al.*,
Appellees
and
SMITH, *et al.*,
Appellants
v.
JAFFREE, *et al.*,
Appellees

Appeal from the United States Court of Appeals for the Eleventh Circuit

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JOINT APPENDIX

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APPEAL DOCKETED NOVEMBER 14, 1983
PROBABLE JURISDICTION NOTED APRIL 2, 1984

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JOINT APPENDIX

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*Documents appear in the Appendix to the Jurisdictional Statement.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

May 28, 1982—Plaintiff Jaffree's Original Complaint filed in U.S. District Court for the Southern District of Alabama.

June 4, 1982—Plaintiff's Amended Complaint filed with Class Action Allegation.

June 25, 1982—Answer of Defendants Mobile County School Board, School Board Members and Named Teachers filed jointly.

June 30, 1982—Plaintiff's Second Amended Complaint adding the Governor, Attorney General, the State Superintendent and Members of the State Board of Education.

July 6, 1982—Mobile County School Board's Answer Amended Complaint.

July 12, 1982—Mobile County School Board's Answer to Second Amended Complaint.

July 15, 1982—Plaintiff's Motion for a Temporary Restraining Order.

July 27, 1982—Answer of Alabama State Board of Education.

July 28, 1982—Plaintiff's Motion for Summary of Judgment.

July 28, 1982—Governor James' Answer.

July 28, 1982—Governor James' Motion to Dismiss.

July 29, 1982—Mobile County School Board's Amended Answer.

July 30, 1982—Motion of Douglas Smith, et al, to Intervene.

August 2, 1982—Hearing on Plaintiff's Request for Preliminary Injunction.

August 2, 1982—Issues bifurcated into separate cases, a case against the State (82-0792-H) and a case against the Mobile County School Board (82-0554-H).

November 15, 1982—Trial on the Merits in 82-0554-H.

January 14, 1983—Court Opinions and Judgments in 82-0554-H and 82-0792-H.

January 17, 1983—Plaintiff's Notice of Appeal.

May 12, 1983—Opinion and Judgment of the Court of Appeals for the Eleventh Circuit.

August 15, 1983—Motion by Rehearing En Banc denied by the Court of Appeals for the Eleventh Circuit.

October 14, 1983—Injunction by the District Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

[Filed May 28, 1982]

Civil Action No. 82-0554-H

ISHMAEL JAFFREE; JAMAEL AAKKI JAFFREE, MAKEBA GREEN, and CHIOKE SALEEM JAFFREE, infants, by and through their best of friend and father, ISHMAEL JAFFREE,

Plaintiffs,

vs.

THE BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY; DAN C. ALEXANDER, DR. NORMAN BERGER, HIRAM BOSARGE, NORMAN G. COX, RUTH F. DRAGO, and DR. ROBERT GILLIARD, in their official capacities as members of the Board of School Commissioners of Mobile County; DR. ABE L. HAMMONS, in his official capacity as Superintendent of the Board of Education of Mobile County; ANNIE BELL PHILLIPS, individually and in her official capacity as principal of MORNINGSIDE ELEMENTARY SCHOOL; JULIA GREEN, individually and in her official capacity as a teacher at MORNINGSIDE ELEMENTARY SCHOOL; BETTY LEE, individually and in her official capacity as principal of E.R. DICKSON ELEMENTARY SCHOOL; CHARLENE BOYD, individually and in her official capacity as a teacher at E.R. DICKSON ELEMENTARY SCHOOL; EMMA REED, individually and in her official capacity as principal of CRAIGHEAD ELEMENTARY SCHOOL; PIXIE ALEXANDER, individually and in her official capacity as a teacher at CRAIGHEAD ELEMENTARY SCHOOL;

Defendants.

VERIFIED COMPLAINT

Preliminary Statement

Plaintiffs bring this action seeking principally a declaratory judgment and an injunction restraining the Defendants and each of them from maintaining or allowing the maintenance of regular religious prayer services or other forms of religious observances in the Mobile County Public Schools in violation of the First Amendment and as made applicable to states by the Fourteenth Amendment to the United States Constitution. Plaintiffs further seek to enjoin Defendant REED and Defendant PIXIE ALEXANDER from maintaining or allowing the maintenance of courses of instruction which have as their primary purpose the furtherance of the establishment of a religion in violation of the First Amendment to the United States Constitution.

I.

JURISDICTION

1. This cause of action arises under the First and Fourteenth Amendments to the United States Constitution and pursuant to Section 1983 and Section 1988, Title 42 of the United States Code. The jurisdiction of this Court is evoked pursuant to Title 28, Sections 1343(3) and (4), and Sections 2201 and 2202 of the United States Code.

II.

PLAINTIFFS

2. Plaintiff, ISHMAEL JAFFREE, is a citizen of the United States, a resident of Mobile County, Alabama, and is over the age of twenty-one (21) years. ISHMAEL JAFFREE is the father of Plaintiffs JAMAEL AAKKI JAFFREE, MAKEBA GREEN and CHIOKE SALEEM JAFFREE, who are all minor children enrolled in the Public School System of Mobile County, Alabama.

3. Plaintiff, JAMAEL AAKKI JAFFREE, is a minor child enrolled in the second grade of a Special Education Class at MORNINGSIDE ELEMENTARY SCHOOL in Mobile County, Alabama.

4. Plaintiff, MAKEBA GREEN, is a minor child enrolled in the second grade at CRAIGHEAD ELEMENTARY SCHOOL located in Mobile County, Alabama.

5. Plaintiff, CHIOKE SALEEM JAFFREE, is a minor child enrolled in the Kindergarten class at E.R. DICKSON ELEMENTARY SCHOOL.

III.

DEFENDANTS

6. Defendant, BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, is the public body charged by the laws of the State of Alabama with administering the system of public instruction for Mobile County, Alabama.

7. Defendants, DAN C. ALEXANDER, BERGER, BOSARGE, COX, DRAGO, and GILLIARD, are each sued in their official capacities as members of the BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ALABAMA.

8. Defendant, DR. ABE L. HAMMONS, is sued in his official capacity as Superintendent of Education for Mobile County, Alabama.

9. Defendant, ANNIE BELL PHILLIPS, is the principal of MORNINGSIDE ELEMENTARY SCHOOL and as such she is principally responsible for the day-to-day operation of the school and has direct supervisory responsibility for the teachers and their support staff. Defendant PHILLIPS is sued both individually and in her official capacity as principal of MORNINGSIDE ELEMENTARY SCHOOL.

10. Defendant, BETTY LEE, is the principal of E.R. DICKSON ELEMENTARY SCHOOL, and as such she is principally responsible for the day-to-day operation of the school and has direct supervisory responsibility for the teachers and their support staff. Defendant LEE is sued both individually and in her official capacity as principal of E.R. DICKSON ELEMENTARY SCHOOL.

11. Defendant, EMMA REED, is the principal of CRAIGHEAD ELEMENTARY SCHOOL, and as such she is principally responsible for the day-to-day operation of the school and has direct supervisory responsibility for the teachers and their support staff. Defendant REED is sued both individually and in her official capacity as principal of CRAIGHEAD ELEMENTARY SCHOOL.

12. Defendant, JULIA GREEN, is the teacher for the class in which Plaintiff JAMAEL AAKKI JAFFREE is enrolled. This Defendant teaches a class at MORNINGSIDE ELEMENTARY SCHOOL for students with special learning disabilities and has supervisory responsibilities over two (2) teacher's aides assigned to this class. Defendant GREEN and/or her aides have lead and continue to lead the students in devotional services. The second grade students are expected to respond in unison twice daily to "grace" prior to breakfast and prior to lunch. Defendant GREEN is sued both individually and in her official capacity as a teacher at MORNINGSIDE ELEMENTARY SCHOOL.

13. Defendant, CHARLENE BOYD, is a teacher for the class in which Plaintiff, CHIOKE SALEEM JAFFREE, is enrolled. This Defendant teaches a Kindergarten class at E.R. DICKSON ELEMENTARY SCHOOL. Defendant BOYD leads her class in unison in chanting a religiously based devotional grace prior to eating lunch. Defendant BOYD is sued both individually and in her official capacity as a teacher at E.R. DICKSON ELEMENTARY SCHOOL.

14. Defendant, PIXIE ALEXANDER, is a teacher for the class in which Plaintiff, MAKEBA GREEN, is enrolled. This Defendant is assigned to a second grade class at CRAIGHEAD ELEMENTARY SCHOOL. Defendant, PIXIE ALEXANDER, in addition to providing her class with instructional materials which have the effect of furthering a belief in the establishment of a Judeo-Christian religion also leads them in a devotional chant prior to the lunchbreak. Defendant, PIXIE ALEXANDER, is sued both individually and in her official capacity as a teacher at CRAIGHEAD ELEMENTARY SCHOOL.

IV.

STATEMENT OF THE CASE

15. Plaintiff, JAMAEL AAKKI JAFFREE, age 9, and Plaintiff, CHIOKE SALEEM JAFFREE, age 6, have been subjected to various acts of religious indoctrination orchestrated by Defendant GREEN and Defendant BOYD and their support staff from the beginning of the school year in September, 1981, and continuing.

16. Plaintiff, MAKEBA GREEN, has been exposed to a daily ritual of religious indoctrination by Defendant, PIXIE ALEXANDER, since this Plaintiff became matriculated into the Mobile County Public School System during the month of April, 1982.

17. Plaintiffs CHIOKE SALEEM JAFFREE and MAKEBA GREEN have been and continue to be exposed to a public classroom setting where the teacher on a daily basis leads the class in saying the following prayer in unison:

> "God is good, God is great, and we thank *HIM* for this food." (Emphasis supplied.)

18. Plaintiff JAMAEL AAKKI JAFFREE, on a daily basis, must line up with the rest of his classmates for lunch and prior to their departure to the lunchroom they

are lead by Defendant GREEN or a member of her support staff in singing a religiously based song from a book entitled *This is Music*. The song which the children sing contains several references to a deity.

19. All of the minor Plaintiffs are exposed to ostracism from their peer group class members if they do not participate in these daily devotional activities.

20. On numerous occasions, the minor Plaintiffs have complained to their best friend and father, ISHMAEL JAFFREE, that their respective teachers lead them in devotional prayer prior to breakfast and lunch.

21. On or about February 1, 1982, Plaintiff, ISHMAEL JAFFREE, wrote a letter to Defendant BOYD, requesting that she cease and desist from conducting religious observances in the form of "grace" in the classroom where his minor son, CHIOKE, is enrolled. This Plaintiff further communicated with Defendant BOYD's immediate supervisor, Defendant LEE, and requested that these devotional observances be stopped.

22. Defendant LEE, in response to Plaintiff ISHMAEL JAFFREE's request, informed him that Defendant BOYD's grace chants had been approved by someone in the Superintendent's Office. Defendant LEE further informed this Plaintiff that as long as the saying of "grace" was voluntary and the students were not forced to participate, it was lawful.

23. In total and willful disregard of Plaintiff, ISHMAEL JAFFREE's, written and oral complaints, the Defendants knowingly continued to conduct religious observances in the classroom where the minor Plaintiffs are enrolled.

24. On May 10, 1982, at approximately 11:30 A.M., Plaintiff ISHMAEL JAFFREE, visited MORNINGSIDE ELEMENTARY SCHOOL to discuss his son, JAMAEL AAKKI JAFFREE's, academic performance with Defendant, GREEN. While in the classroom Mr. Jaffree

personally observed the class being lead in a devotional song by one of Defendant GREEN's support staff. This activity had the support, if not the actual encouragement, of Defendant GREEN.

25. On May 10, 1982, Plaintiff, ISHMAEL JAFFREE, wrote a letter to Defendant ABE L. HAMMONS, in which he again formally complained of the prayer sessions being orchestrated by Defendants GREEN, BOYD, and PIXIE ALEXANDER. Copies of these letters were sent to Defendants PHILLIPS, LEE, and REED. A true and correct copy of this letter is attached and marked at Attachment "A". Plaintiff, ISHMAEL JAFFREE, subsequent to the mailing of the May 10, 1982 letter contacted Defendants PHILLIPS, LEE, and REED, and each acknowledged receipt of the letter. Notwithstanding their receipt of this letter, and in willful disregard thereof, the prayer activities complained of continued and to-date still continue.

26. Defendant, ABE L. HAMMONS, Superintendent of the Board of Education of Mobile County, has taken no action to stop the religiously based activities of Defendants GREEN, BOYD, and PIXIE ALEXANDER.

27. On May 27, 1982, Plaintiff, ISHMAEL JAFFREE, attempted to discuss the matter of his daughter's exposure to religious indoctrination with Defendant REED. In total and complete disregard of his concerns, Defendant REED refused to discuss the matter with Mr. Jaffree and stated that the matter was in the hands of Defendant, ABE L. HAMMONS, and that she wasn't to be consulted about it.

28. On information and belief, Plaintiffs aver that Defendant PIXIE ALEXANDER uses several books of a religious nature to teach her class about religion and to encourage their belief therein.

29. Plaintiffs JAMAEL AAKKI JAFFREE, CHIOKE SALEEM JAFFREE and MAKEBA GREEN, all have

suffered and continue to suffer severe emotional distress from being forced to participate, via peer group pressure, in devotional observances orchestrated by the Defendants. This is expressly true since their father has assured each of them that prayer in school is unlawful and yet, they are exposed to it on a daily basis. These Plaintiffs must either acquiesce in something in which they may not believe or endure the humiliation of their classmates.

30. Plaintiff, ISHMAEL JAFFREE, has suffered and continues to suffer severe emotional and mental anguish by having his children exposed to Judeo-Christian religious doctrines in violation of the establishment clause of the First Amendment of the United States Constitution.

31. Defendants have willfully, maliciously and wantonly disregarded Plaintiffs' constitutional rights by engaging in activities designed to foster a belief in religion.

32. Defendants have willfully, maliciously and wantonly caused the Plaintiffs to suffer great mental and emotional distress by failing or otherwise refusing to cease and desist from engaging in activities designed to foster a belief in religion.

V.

CLAIM OF RELIEF

33. Plaintiffs hereby incorporate by reference the allegations contained in paragraphs 1 through 32 above, as though fully set out herein.

34. Defendants' acts of encouraging students to chant in unison phrases containing religiously based language constitute a violation of the establishment clause of the First Amendment of the United States Constitution and Title 42, Section 1983 of the United States Code.

35. Defendant, PIXIE ALEXANDER's, act of reading to her class from instructional material designed to

foster a belief in religion constitutes a violation of the establishment clause of the United States Constitution and Title 42, Section 1983 of the United States Code.

VI.

PRAYER FOR RELIEF

WHEREFORE, THE PREMISES CONSIDERED, the Plaintiffs respectfully ask this Court to grant the following relief:

a. That the Court accept jurisdiction over this cause;

b. That the Court issue a judgment declaring that the Defendants, by leading the children in their class in songs, grace, or chants which further a belief in religion are engaging in activities which are unconstitutional and in violation of the First Amendment of the United States Constitution;

c. That the Court issue a judgment declaring that Defendants, by reading from instructional materials whose contents further a belief in religion are engaging in activities which are unconstitutional and in violation of the First Amendment of the United States Constitution;

d. That afer a hearing, this Court issue a permanent injunction against the Defendants, their agents, assigns, successors in office, attorneys, and all others actively participating with them from continuing devotional services in the form of songs, chants, or the saying of "grace" and from engaging in any other activities designed to encourage a belief in religion;

e. That after a hearing, this Court issue a permanent injunction against the Defendants, their agents, assigns, successors in office, attorneys and all others actively participating with them from continuing to teach from instructional materials designed to encourage a belief in religion;

f. That the Court award costs and reasonable attorney's fees;

g. That the Court award the Plaintiffs the sum of $15,000.00 as compensatory damages for their mental suffering;

h. That the Court award Plaintiffs $100,000.00 as punitive damages; and

i. That the Court award the Plaintiffs such other, further and different relief as the Court may deem necessary or appropriate.

Respectfully submitted on this the 28th day of May, 1982.

VERIFICATION

Appeared before me, a Notary Public, in and for said State and County, ISHMAEL JAFFREE, who being by me first duly sworn, deposes and says that he has read the foregoing Verified Complaint and same is true and correct to the best of his knowledge and belief.

/s/ Ishmael Jaffree
ISHMAEL JAFFREE

Sworn to and subscribed to before me on this the 28th day of May, 1982.

/s/ Dorothy L. Brewer
Notary Public,
State at Large

My Commission Expires: 4/9/86.

/s/ Ronnie L. WILLIAMS
RONNIE L. WILLIAMS
Attorney for Plaintiff
103 Dauphin Street—
Suite 716
Mobile, Alabama 36602
(205) 432-6985

ISHMAEL JAFFREE
1705 Marengo Drive
Mobile, Alabama 36605

May 10, 1982

Dr. Abe L. Hammons
Superintendent
Mobile County Public School System
Post Office Box 1327
Mobile, Alabama 36633

Dr. Dr. Hammons:

I am the parent of three (3) minor children who are presently matriculated in the Mobile County Public School System, of which you have direct supervision. The children and the schools they attend are, respectively: Jamael Aakki Jaffree, Morningside Elementary School; Makeba Green, Craighead Elementary School[;] and Chioke Saleem Jaffree, E. R. Dickson Elementary School. Each of my children has, both on separate occasions and collectively, complained to me that a form of subtle coercion (my language, not theirs) has been used against them to induce them to participate in *voluntary* school prayer in the form of either a chant or saying grace.

Assuming argumentum that any of the complaints are meritorious, then a violation of the First Amendment, Freedom of Religion Clause of the U.S. Constitution has occurred. In an unbroken line of cases decided by the U.S. Supreme Court (cites will be furnished upon request), the Court has stated emphatically that the school system is not a proper place for *voluntary* school prayer initiated or orchestrated by an agent, servant, or employee of the State. In the realm of "public education", where you have the coercive presence of an instructor, acting in *locus parenti*, and where you have group dynamics at play, there can be no such creature as "volun-

tary prayer" or the voluntary observance of or recognition of a deity. The urge to conform to expected behavior is overwhelming. It would be asking too much of any child (especially one of tender years) to overcome or subdue such pressure.

It matters not what you or I may personally feel about the merits or demerits of religious education. The fact, simply put, is that the school room (public) is not the proper place for such instruction. The separation of church and State demands no less. Further, the First Amendment clause of the United States Constitution implicitly provides that in addition to freedom of religion, its citizens shall be free *from* religion where such religion is pursuant to an act of the State. If the School Board feels that *theology* is a proper subject to be included in the classroom curriculum, not matter how briefly it is treated, then in fairness, the scope of such theology should not be limited to Judeo-Christian doctrines. The curriculum should include, but certainly not be limited to, instruction in atheism, agnosticism, buddhism, existentialism and yes, (swallow hard) even communism. This way, the students will at least have a broad perspective on different forms of theological and philosophical thought and hopefully develop a broader educational perspective. Of course, no public school, especially in the bible-toting antebellum South, would fathom such a curriculum. Therefore, it is best that the Mobile County Public School System leave theology in the hands of those best able to teach it and take it cut of the hands of instructors—a few of whom, as we well know, have difficulty imparting instructional materials which are within their providence. None of my children's teachers are intended to be within this circular group.

I am looking forward to hearing from you soon concerning this matter. I am hopeful that this issue can be resolved informally. However, I am prepared to provide

my children with the full panoply of rights granted to them by the United States Constitution.

Sincerely,

/s/ Ishmael Jaffree
ISHMAEL JAFFREE
Attorney-at-Law

IJ.hs

cc: The American Civil Liberties Union
Principal, E. R. Dickson Elementary School
Principal, Erwin Craighead Elementary School
Principal, Morningside Elementary School

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

[Title Omitted]

[Filed Jun. 4, 1982]

AMENDED COMPLAINT

COME NOW, the Plaintiffs, who amend their Complaint as a matter of course pursuant to Rule 15(a) of the FEDERAL RULES OF CIVIL PROCEDURE. Plaintiffs seek to amend their Complaint to bring this action not only for themselves, but alson [*sic*] on behalf of all others similarly situated. The Complaint shall be amended as follows:

1. The style of the case is amended to read:

Civil Action No. 82-0554-H

ISHMAEL JAFFREE, *et al.*, on their own behalf and on behalf of all others similarly situated,
Plaintiffs,

vs.

THE BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNY, *et al.*,
Defendants.

2. Subsection II. of Plaintiff's original Complaint is amended as follows:

II.

CLASS ACTION ALLEGATIONS

5. (a) In addition to their individual claims, Plaintiffs bring this suit as a class action pursuant to Rules 23(a) and (b)(2) of the FEDERAL RULES

OF CIVIL PROCEDURE on behalf of all students currently enrolled in the Mobile County Public School System and those who will, in the future, be enrolled in the Mobile County Public School System, who, during the normal school hours, have been, are being, or will be exposed to religious prayer, religious chants, religious songs, or other forms of religious observances initiated by or, with the approval of, the Defendants in violation of the First Amendment to the United States Constitution.

5. (b) The class is so numerous that joinder of all members is impractical and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Each of the named minor plaintiffs are enrolled in a class which consists of approximately thirty (30) students. Additionally, the Defendants, BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, have direct responsibility for over fifty (50) Elementary Schools, fifteen (15) Middle Schools, and fifteen (15) High Schools within Mobile County, Alabama. Each of these schools has numerous classrooms, each consisting convservatively [*sic*] of fifteen (15) or more students. The exact size of the class is not now know [*sic*] to Plaintiffs.

5. (c) There are questions of fact and law which are common to the Class and which predominate over any questions affecting only the individual named Plaintiffs, *i.e.*, whether or not the Defendants' acts providing religiously basec [*sic*] chants, songs, grace recitations or other forms of religious observances during the normal school hours are in violation of the First Amendment of the United States as made applicable to the States by the Fourteenth Amendment to the United States Constitution.

5. (d) The claims of the Plaintiffs are typical of the claims of the Class and Plaintiffs will fairly and

adequately protect the interest of the Class. Plaintiffs can and do undertake honorably to represent the Class.

5. (e) In addition, the parties opposing the Class have acted and continue to act on grounds generally applicable to the Class as a whole (*i.e.*, providing religious observances as part of the normal classroom activity), thereby making appropriate final injunctive relief or, corresponding declaratory relief with respect to the Class as a whole.

3. Subsection IV, of the Plaintiffs' original Complaint is amended by adding Paragraphs 32 (a) and (b), which shall read as follows:

32. (a) On information and belief, Plaintiff aver that the complained of activity, *i.e.*, religious observances initiated by teachers, exists throughout the entire Mobile County School System with the knowledge of and with the support of the BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY and the defendant ABE HAMMONS.

33. (b) On information and belief, Plaintiffs aver that the Defendants, BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, and Defendant, ABE HAMMONS, have a policy, either written or unwritten, which permits teacher employed by the Board of Education of Mobile County, to conduct religious activities in the classroom so long as individual students are not compelled to attend.

4. Subsection VI, of Plaintiffs' original Complaint is amended as follows:

(j) That as soon as practical this matter be certified as a Class, and allow the Plaintiffs to proceed on behalf of the Class as a whole.

(k) That this Court issue a permanent injunction against the BOARD OF SCHOOL COMMISSION-

ERS OF MOBILE COUNTY and Dr. ABE L. HAMMONS, their agents, assigns, successors in office, attorneys and all others actively participating with them from permitting devotional services in the form of songs, chants, the saying of grace, and from engaging in any other forms of religious observances designed to or have the primary effect of encouraging a belief in religion in violation of the First Amendment of the United States Constitution.

(l) That this Court issue an Order against the BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY and Dr. ABE L. HAMMONS, requiring them to take affirmative steps to notify all teachers employed by the Board of Education of Mobile County that devotional services in the form of songs, chants, the saying of grace, and/or any other activities designed to or have the primary effect of encouraging a belief in religion shall be in violation of the First Amendment of the United States Constitution and in violation of the School Board's policies.

(m) That this Court issue such other appropriate and necessary declaratory and injunctive relief with respect to the Class as a whole as it deems justified.

Respectfully submitted this the 4th day of June 1982.

/s/ Ronnie L. Williams
RONNIE L. WILLIAMS
Attorney for Plaintiffs
103 Dauphin Street, Suite 716
Mobile, Alabama 36602
205/432-6985

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

[Title Omitted]

[Filed Jun. 30, 1982]

SECOND AMENDED COMPLAINT

COME NOW, the Plaintiffs, who proffer this as their Second Amended Complaint. Unless expressly provided herein, this amendment is intended to augment, not supplant, the averments contained in Plaintiffs' original and first amended complaint.

Paragraphs 1 through 35 and a through i of Plaintiffs' original complaint and paragraphs 1 through 4 of Plaintiffs' first amended complaint are realleged, repled and repeated as though fully set out herein.

1. The style of the case is further amended as follows:

ISHMAEL JAFFREE; JAMAEL AAKKI JAFFREE, MAKEBA GREEN, and CHIOKE SALEEM JAFFREE, infants, by and through their best of friend and father, ISHMAEL JAFFREE,
Plaintiffs,

vs.

FOB JAMES, in his official capacities as Governor of the State of Alabama and ex officio member of the State Board of Education; CHARLES GRADDICK, in his official capacity as Attorney General for the State of Alabama; JOHN TYSON, JR., RON CREEL, S.A. CHERRY, RALPH HIGGINBOTHAM, VICTOR P. POOLE, HAROLD C. MARTIN, JAMES B. ALLEN, JR., and ROSCOE ROBERTS, JR., in their official ca ac-

ities as members of the Alabama State Board of Education; WAYNE TEAGUE, in his official capacity as Superintendent of the Alabama State Board of Education; THE BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY; DAN C. ALEXANDER, DR. NORMAN BERGER, HIRAM BOSARGE, NORMAN G. COX, RUTH F. DRAGO, and DR. ROBERT GILLIARD, in their official capacities as members of the BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY; DR. ABE L. HAMMONS, in his official capacity as Superintendent of the BOARD OF EDUCATION OF MOBILE COUNTY; ANNIE BELL PHILLIPS, individually and in her official capacity as principal of MORNINGSIDE ELEMENTARY SCHOOL; JULIA GREEN, individually and in her official capacity as a teacher at MORNINGSIDE ELEMENTARY SCHOOL; BETTY LEE, individually and in her official capacity as principal of E.R. DICKSON Elementary SCHOOL; CHARLENE BOYD, individually and in her official capacity as a teacher at E.R. DICKSON ELEMENTARY SCHOOL; EMMA REED, individually and in her official capacity as principal of CRAIGHEAD ELEMENTARY SCHOOL; PIXIE ALEXANDER, individually and in her official capacity as a teacher at CRAIGHEAD ELEMENTARY SCHOOL;

Defendants.

PRELIMINARY STATEMENT

2. The Preliminary Statement contained in Plaintiffs' original complaint is supplemented by adding the following paragraph:

Plaintiffs, and the class they seek to represent, further bring this action seeking to enjoin the State Defendants and anyone acting in concert with them from implementing and enforcing certain state laws which provide for prayer in schools in violation of the Constitution of the United States of America and the Constitution of the State of Alabama.

JURISDICTION

3. The jurisdictional statement is amended by adding the following three sentences:

Declaratory relief prayed for in this action is authorized by 28 U.S.C. Sections 2201 and 2202. This Court has pendent jurisdiction over the claims arising under Article I, Section 3 of the Constitution of Alabama of 1901. The cause of action arose in Mobile County, Alabama.

DEFENDANTS

4. Subsection III of Plaintiffs' original Complaint, which identifies the Defendants, is supplemented by adding the following Defendants:

Defendant, FOB JAMES, is Governor of the State of Alabama. As Governor, he is vested, pursuant to Article V, Section 113, of the Constitution of Alabama of 1901, with supreme executive power of the state. Further, in addition to serving as an ex officio member of the State Board of Education, Alabama Code Section 16-3-2 (1975) mandates that the governor preside as president of the Board. As a Board member, Defendant JAMES is empowered to exercise general control and supervision over the public schools of the State. Defendant JAMES is sued only in his official capacities as Governor of the State of Alabama and ex officio member of the State Board of Education.

Defendant, CHARLES GRADDICK, is the Attorney General for the State of Alabama. As Attorney General he is required by Amendment 111, Section 137 of the Constitution of Alabama of 1901 and Alabama Code Section 36-15-1(3) to defend suits brought against any State school board or State board of education or against any county or city school board or board of education. Defendant GRADDICK is made a party defendant and is sued only in his official capacity as Attorney General.

Defendants, TYSON, CREEL, CHERRY, HIGGINBOTHAM, POOLE, MARTIN, ALLEN and ROBERTS, are all members of the State Board of Education. Collectively with the Governor, they are empowered to exercise general control and supervision over the public schools of the State. These members are sued only in their official capacities.

Defendant, WAYNE TEAGUE, is the State Superintendent of Education. As Superintendent, he serves, pursuant to Alabama Code Section 16-4-1, as Chief Executive Officer of the State Department of Education. He is further charged with the duty to enforce all laws, rules and regulations pertaining to education in the State of Alabama, Alabama Code Section 16-4-4. Defendant TEAGUE is sued only in his official capacity as State Superintendent of Education.

STATEMENT OF THE CASE

5. Plaintiffs' statement of the case is augmented by the addition of the following paragraphs to be enumerated as paragraphs 32(a) through 32(o):

32. (a) In 1978, the Alabama legislative body promulgated an act, (Alabama Code Section 16-1-20) though designated as allowing for a "period of silence for meditation," had as its primary legislative purpose the establishment of religion.

32. (b) Pursuant to the grant of authority contained in Alabama Code Section 16-1-20, Defendants GREEN, BOYD and PIXIE ALEXANDER have led their classes in religiously based prayer activities.

32. (c) On information and belief, many of the teachers employed by the Mobile County School Board have, under the authority granted by Section 16-1-20, led their class in religiously based prayer activities.

32. (d) In 1981, the Alabama legislative body amended Section 16-1-20 (16-1-20.1 1981) to clarify their intent to

have prayer as part of the daily classroom activity. This amendment expressly gave the teachers the unfettered discretion of leading the class in "a period of silence" or a "voluntary prayer".

32. (e) The expressed legislative purpose in enacting Section 16-1-20.1 (1981) was to "return voluntary prayer to (Alabama's) public schools".

32. (f) Pursuant to the grant of authority contained in Section 16-1-20.1, Defendants GREEN, BOYD and PIXIE ALEXANDER, have led their classes in religiously based prayer activities.

32. (g) On information and belief, many of the teachers employed by the Mobile County School Board have, under the authority granted by Section 16-1-20.1, led their class in religiously based prayer activities.

32. (h) In 1982—during a Special Session of the Alabama Legislature called by Defendant JAMES for the purpose of acting on a "prayer amendment" to be introduced by him—the State Legislature passed a Bill (subsequently signed by Defendant JAMES), denominated as S.B. 61, 1982 and which provided:

> To prescribe a period of time in the public schools, not to exceed 15 minutes, for the study of the formal procedures followed by the United States Congress which study *shall* include the reading verbatim of one of the opening prayers given by either the House or Senate Chaplin at the beginning of the meeting of the United States House or Senate.
>
> BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:
>
> Section 1. At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which said class is held *shall*, for a period of time not exceeding 15 minutes, instruct the class in the formal procedure

> followed by the United States Congress. The study *shall* include, but not be limited to, a reading verbatim of one of the opening prayers given by either the House or Senate Chaplin at the beginning of the meeting of the House or Senate. Any student may select an opening House or Senate prayer from the Congressional Record for use by the class. (Emphasis added.)

32. (i) During the same Special Session referenced in paragraph 32. (h) above, the State Legislature promulgated the following bill denominated as S.B. 8, 1982:

> To provide for a prayer that may be given in the public schools and educational institutions of this state.
>
> BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:
>
> Section 1. From henceforth, any teacher or professor in any public educational institution within the State of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, *may lead the willing students in the following prayer to God:*
>
> Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools. In the name of our Lord. Amen.

32. (j) The principal, if not sole, legislative purpose in enacting S.B. 61 and S.B. 8, was to advance religion in the public schools in the State of Alabama.

32. (k) S.B. 61 and S.B. 8 both became effective upon passage and approval by the Governor.

32. (l) The mandate of both S.B. 61 and S.B. 8 requires teachers to implement their provisions immediately upon the act becoming effective.

32. (m) Unless enjoined the Defendants plan to implement the provisions of S.B. 61 and S.B. 8 and advance religion in public schools in the State of Alabama.

32. (n) Plaintiffs JAMAEL AAKKI JAFFREE, MAKEBA GREEN and some of the members of the class they seek to represent are presently enrolled in summer school in Mobile County, Alabama.

32. (o) Plaintiffs and the members of the class they seek to represent have suffered and will continue to suffer immediate and irreparable injury unless Defendants are enjoined from further implementing and/or enforcing Alabama Code Sections 16-1-20, 16-1-20.1, S.B. 61 and S.B. 8.

CLAIM OF RELIEF

6. To the claim of relief averred in Plaintiffs' original complaint, the following claims of relief are added:

SECOND CLAIM OF RELIEF

The "Period of Silence" law found at Alabama Code Section 16-1-20 has the primary purpose and effect of fostering a belief in religion in violation of the Establishment Clause and the Free Exercise Clause of the First Amendment to the United States Constitution.

THIRD CLAIM OF RELIEF

The "Voluntary Prayer" law found at Alabama Code Section 16-1-20.1 and the practice of the school prayer period violate both the Establishment Clause and Free Exercise Clause of the First Amendment to the United States Constitution.

FOURTH CLAIM OF RELIEF

The Compulsory Study Congress law marked as S.B. 61, 1982, found at Alabama Code Section ———, which requires the verbatim recitation of a prayer given by either the House or Senate Chaplin violates both the Establishment Clause and Free Exercise Clause of the First Amendment to the United States Constitution.

FIFTH CLAIM OF RELIEF

The Specific Prayer law marked as S.B. 8, 1982, found at Alabama Code Section ———, which authorizes teachers to lead their class in saying a specific prayer violates both the Establishment Clause and Free Exercise Clause of the First Amendment to the United States Constitution.

SIXTH CLAIM OF RELIEF

The "Period of Silence" law found at Alabama Code Section 16-1-20 has the primary purpose and effect of fostering a belief in religion in violation of both the Establishment Clause and Free Exercise Clause of Article I, Section 3 of the Constitution of Alabama of 1901.

SEVENTH CLAIM OF RELIEF

The "Voluntary Prayer" law found at Alabama Code Section 16-1-20.1 and the practice of the school prayer period violate both the Establishment Clause and Free Exercise Clause of Article I, Section 3 of the Constitution of Alabama of 1901.

EIGHTH CLAIM OF RELIEF

The Compulsory Study Congress law marked as S.B. 61, 1982, found at Alabama Code Section ——, which requires the verbatim recitation of a prayer given by either the House or Senate Chaplin, violates both the Establishment Clause and Free Exercise Clause of Article I, Section 3 of the Constitution of Alabama of 1901.

NINTH CLAIM OF RELIEF

The Specific Prayer law marked as S.B. 8, 1982, found at Alabama Code Section ——, which authorizes teachers to lead their class in saying a specific prayer violate both the Establishment Clause and Free Exercise Clause of Article I, Section 3 of the Constitution of Alabama of 1901.

PRAYER FOR RELIEF

7. The Prayer for Relief found in both Plaintiffs' original complaint and their first amended complaint, is augmented by adding the following paragraphs:

n. That the Court preliminarily and permanently enjoin the Defendants, their employees, agents, and successors in office from enforcing or implementing in any way Alabama Code §§ 16-1-20, 16-1-20.1 and Senate Bills 61 and 8 and from authorizing the offering of prayer in public schools.

o. To enter a declaratory judgment declaring that Alabama Code §§ 16-1-20, 16-1-20.1 and Senate Bills 61 and 8 violate the First and Fourteenth Amendments of the United States Constitution and Article I, Section 3 of the Constitution of Alabama of 1901.

Respectfully submitted, this the 3rd day of June, 1982.

/s/ Ronnie L. Williams
RONNIE L. WILLIAMS
103 Dauphin Street, Suite 716
Mobile, Alabama 36602
(205) 432-6985

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

[Title Omitted]

[Filed Jul. 27, 1982]

ANSWER OF DEFENDANTS TYSON, CREEL, CHERRY, HIGGINBOTHAM, POOLE, MARTIN, ALLEN, AND ROBERTS, ELECTED MEMBERS OF THE ALABAMA STATE BOARD OF EDUCATION; AND WAYNE TEAGUE ALABAMA STATE SUPERINTENDENT OF EDUCATION

Come now the above-named Defendants and for Answer to the Complaint previously filed in the above-styled case, these Defendants say as follows:

FIRST DEFENSE

1. The District Court lacks jurisdiction under 28 U.S.C. § 1343(3) over these Defendants in that it affirmatively appears from the Complaint that these Defendants have not deprived the Plaintiffs of any rights, privileges or immunities secured to them by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

SECOND DEFENSE

2. The District Court lacks jurisdiction over these defendants under the provisions of 28 U.S.C. § 1343(4).

THIRD DEFENSE

3. The District Court lacks jurisdiction over these Defendants in that as a matter of law there is no case

or controversy existing between the Plaintiffs and these Defendants.

FOURTH DEFENSE

4. The District Court lacks jurisdiction over these Defendants under 28 U.S.C. §§ 2201 and 2202 in that as a matter of law there is no "actual controversy" existing between the Plaintiffs and these Defendants.

FIFTH DEFENSE

5. The Complaint fails to state against these Defendants a claim under 42 U.S.C. § 1983 upon which relief may be granted.

SIXTH DEFENSE

6. The Court lacks jurisdiction over these Defendants in that the allegations and claims made against the members of the Alabama State Board of Education and the State Superintendent of Education are made against these Defendants solely in their official capacities, and the nature of such claims reveals that these claims represent an action against the State of Alabama which has not consented to be sued nor waived its immunity from suit.

SEVENTH DEFENSE

7. The Complaint fails to state a claim against these Defendants under 28 U.S.C. §§ 1983 and 1988 upon which relief may be granted in that the claims and allegations made against the Defendant officials of the State of Alabama are by their nature claims against the State and the State of Alabama is not a person within the meaning of § 1983 or § 1988.

EIGHTH DEFENSE

8. The Complaint fails to state a claim against these Defendants upon which relief may be granted in that these Defendants are not real parties in interest.

NINTH DEFENSE

For further Answer to the Complaint, these Defendants state as follows:

9. With respect to the paragraph denominated "*Preliminary Statement*" of the original Complaint, no response is required of these Defendants.

10. With respect to paragraph 1 of the original Complaint, these Defendants deny that this Court has jurisdiction under 28 U.S.C. §§ 1343(3) and (4). These Defendants further deny that this court has jurisdiction over them under 28 U.S.C. §§ 2201 and 2202. These Defendants further deny that the Court has jurisdiction of this action such that the Court is authorized to grant any relief against these Defendants under the remedial provisions of 42 U.S.C. §§ 1983 and 1988.

11. With respect to paragraphs 2-5 of the original Complaint, these Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

12. With respect to paragraphs 6-14 of the original Complaint, no response is required of these Defendants.

13. With respect to paragraphs 15-32 of the original Complaint, these Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

14. With respect to paragraphs 33-35 of the original Complaint, no response is required of these Defendants.

15. With respect to that section of the original Complaint denominated "VI. PRAYER FOR RELIEF" these Defendants state that as against these Defendants, the Plaintiffs are not entitled to any relief.

16. With respect to the Amended Complaint filed by Plaintiffs under the provisions of Rule 15(a) of the Federal Rules of Civil Procedure, these Defendants deny the

allegations contained in the Amended Complaint and for further Answer deny that this action is properly certifiable as a class action and further deny that as against these Defendants Plaintiffs are entitled to any relief sought through the Amended Complaint.

17. With respect to paragraph 1 of the Second Amended Complaint, these Defendants deny that the Plaintiff is entitled to amend the Complaint and for further Answer state that with respect to paragraph 1 of the Second Amended Complaint, no further response is required.

18. With respect to paragraph 2 of the Second Amended Complaint, these Defendants state that they are not charged with nor do they have under the laws of Alabama any authority to implement or enforce legislation which grants discretion to a classroom teacher to determine whether that teacher will do the act complained of.

19. With respect to paragraph 3 of the Second Amended Complaint, these Defendants deny that 28 U.S.C. §§ 2201 and 2202 afford the Court any basis for jurisdiction over these Defendants in that there is no actual controversy existing between the Plaintiffs and these Defendants. These Defendants further deny that this Court has any pendent jurisdiction over claims arising under Article I, Section 3 of the Constitution of Alabama of 1901.

20. With respect to paragraph 4 of the Second Amended Complaint, no response is required of these Defendants concerning the subparagraphs relating to Governor Fob James and Attorney General Charles Graddick.

21. With respect to the subparagraph of paragraph 4 of the Second Amended Complaint which relates to the Defendants Tyson, Creel, Cherry, Higginbotham, Poole, Martin, Allen and Roberts, these Defendants admit that they are members of the Alabama State Board of Educa-

tion. These Defendants further admit that the State Board of Education is empowered to exercise general control and supervision over the public schools of the State of Alabama. These Defendants deny any inference that they as individual Board Members have any authority to exercise any control and supervision over the public schools of this State.

22. With respect to paragraph 4 of the Second Amended Complaint as it relates to Defendant Teague, this Defendant admits that he is the State Superintendent of Education and the Chief Executive Officer of the Alabama State Department of Education. This Defendant further admits that he is charged with the duty to enforce all education laws of the State of Alabama and rules and regulations of the Alabama State Board of Education pertaining to the public schools of the State of Alabama. This Defendant denies any inference that he is given any authority to enforce laws, rules or regulations which by their terms grant permissive or discretionary authority to other individuals.

23. With respect to paragraph 32(a) of the Second Amended Complaint, these Defendants admit the existence of Code of Alabama (1975) § 16-1-20. The remaining allegations are denied.

24. With respect to paragraphs 32(b) and (c) of the Second Amended Complaint, these Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

25. With respect to paragraph 32(d) of the Second Amended Complaint, these Defendants deny the allegations contained therein.

26. With respect to paragraph 32(e) of the Second Amended Complaint, these Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

27. With respect to paragraphs 32(f) and (g) of the Second Amended Complaint, these Defendants lack knowledge or information sufficient to form a belief as to truth of the allegations contained therein.

28. With respect to paragraph 32(h) of the Second Amended Complaint, these Defendants state that the allegations contained in the paragraph are moot based on the action of the Governor vetoing the referenced legislation.

29. With respect to paragraph 32(i) of the Second Amended Complaint, the allegations contained therein are admitted.

30. With respect to paragraph 32(j) of the Second Amended Complaint, these Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

31. With respect to paragraph 32(k) of the Second Amended Complaint, these Defendants admit that Senate Bill 8 became effective upon its passage and approval by the Governor and for further answer state that Senate Bill 61 was vetoed by the Governor.

32. With respect to paragraph 32(l) of the Second Amended Complaint, these Defendants state that the provisions of Senate Bill 8 do not require teachers to implement the provisions thereof but that the provisions thereof are permissive merely.

33. With respect to paragraph 32(m) of the Second Amended Complaint, these Defendants deny the allegations contained therein.

34. With respect to paragraphs 32(n) and (o) of the Second Amended Complaint, these Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

35. With respect to the sections of the Second Amended Complaint denominated "CLAIM OF RELIEF"

and "PRAYER FOR RELIEF," these Defendants deny that as against these Defendants the Plaintiffs are entitled to any relief sought.

36. For further Answer to the Complaint, these Defendants state that any allegation not specifically admitted herein is denied.

/s/ Charles S. Coody
CHARLES S. COODY

Address:

State Department of Education
State Office Building
Montgomery, AL 36130-3901
(205) 832-6578

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

[Title Omitted]

[Filed Jul. 28, 1982]

ANSWER

COMES NOW Fob James, Governor of Alabama, and for answer to the Plaintiff's Complaint, First Amended Complaint and Second Amended Complaint, and each Cause of Action sought to be stated therein, says as follows:

The allegation contained in the Plaintiff's *Preliminary Statement* is denied.

1. Paragraph I of the Plaintiff's Complaint asserting this Court's jurisdiction over the subject matter of his Complaint is emphatically denied by the Governor of Alabama.

2., 3., 4., 5. The Governor of Alabama is without knowledge sufficient to form a belief as to the truthfulness of the allegations contained in Paragraphs 2. through 5., inclusive, of the Plaintiff's Complaint.

6. Admitted.

7. Admitted.

8. Admitted.

9., 10., 11. The Governor of Alabama is without knowledge sufficient at this time to form a belief as to the truthfulness of the allegations contained in Paragraphs 9, 10, and 11 of the Plaintiff's Complaint.

12. The Governor of Alabama admits that Julia Green is a teacher in the public school system in Mobile County,

Alabama. The Governor of Alabama is without knowledge sufficient to form a belief as to the truthfulness of the allegation that Julia Green teaches a class for students with special learning disabilities and has supervisory responsibilities over two teacher's aids assigned to this class. The remainder of the Plaintiff's allegations in Paragraph 12 of his Complaint are vague and speculative, and therefore denied.

13. The governor of Alabama admits that Charlene Boyd is a teacher in the public school system in Mobile County, Alabama. The Governor of Alabama has knowledge insufficient to form a belief as to the truthfulness of the allegation that Charlene Boyd teaches a kindergarten class at E. R. Dickson Elementary School. The remainder of the Plaintiff's allegations in Paragraph 13 of his Complaint are vague, speculative, and inaccurate, and therefore denied.

14. The Governor of Alabama admits that Pixie Alexander is a teacher in the public school system in Mobile County, Alabama. The Governor is without knowledge sufficient at this time to form a belief as to the allegation that Pixie Alexander is assigned to a second grade class at Craighead Elementary School. The remainder of the Plaintiff's allegations in Paragraph 14 of his Complaint are vague, speculative and inaccurate, and therefore denied.

15., 16. The allegations by the Plaintiff in Paragraph 15 and 16 of his Complaint are denied.

17., 18., 19. The allegations contained in Paragraphs 17, 18, and 19 of the Plaintiff's Complaint are vague, speculative and inaccurate, and therefore denied.

20. The Governor is without knowledge sufficient at this time to form a belief as to the truthfulness of the allegations contained in Paragraph 20 of the Plaintiff's Complaint.

21., 22., 23. The allegations contained in Paragraphs 21, 22, and 23 of the Plaintiff's Complaint are vague, speculative and inaccurate, and therefore denied.

24., 25., 26. The Governor of Alabama has knowledge insufficient at this time to form a belief as to the truthfulness of the allegations contained [in] Paragraphs 24, 25, and 26 of the Plaintiff's Complaint.

27. The allegations contained in Paragraph 27 of the Plaintiff's Complaint are vague, speculative and inaccurate, and therefore denied.

28. The allegations contained in Paragraph 28 of the Plaintiff's Complaint are vague, speculative and inaccurate, and therefore denied.

29., 30., 31., 32. The allegations contained in Paragraphs 29-32, inclusive, of the Plaintiff's Complaint are denied.

3. The Governor of Alabama hereby incorporates by reference his answer to the allegations contained in the *Preliminary Statement*, and Paragraphs 1 through 32, inclusive, of the Plaintiff's Complaint, set out above.

34., 35. The allegations contained in Paragraphs 34 and 35 of the Plaintiff's Complaint are denied.

ANSWER TO THE PLAINTIFF'S FIRST AMENDED COMPLAINT

1. The allegations contained [in] Paragraph 1 of the Plaintiff's Amended Complaint is denied.

2., 3., 4. The allegations contained in Paragraphs 2, 3, and 4 of the Plaintiff's First Amended Complaint are vague, speculative and inaccurate, and therefore denied.

ANSWER TO PLAINTIFF'S SECOND AMENDED COMPLAINT

2. The supplemental *Preliminary Statement* in Paragraph 2 of the Plaintiff's Second Amended Complaint is denied.

3. Paragraph 3 of the Plaintiff's Second Amended Complaint is denied.

4. Paragarph 4 of the Plaintiff's Second Amended Complaint is admitted.

5. Paragraph 5 of the Plaintiff's Second Amended Complaint is answered as hereinafter set out, in Paragraphs 32(a) through 32(o);

32(a). The allegations contained in Paragraph 32(a) of the Plaintiff's Second Amended Complaint are denied.

32(b), 32(c). The allegations contained in Paragraphs 32(b) and 32(c) of the Plaintiff's Second Amended Complaint are denied, as the Defendants Green, Boyd, and Pixie Alexander have led their classes in prayer pursuant to the authority of God recognized by the Declaration of Independence, the Constitution, and the First Amendment thereto, as well as by Alabama Code § 16-1-20.

32(d). Paragraph 32(d) of the Plaintiff's Second Amended Complaint is admitted.

32(e). Paragraph 32(e) of the Plaintiff's Second Amended Complaint is admitted.

32(f), 32(g). The allegations contained in Paragraphs 32(f) and 32(g) of the Plaintiff's Second Amended Complaint are denied, as authority to pray proceeds from God, which authority is recognized by the Declaration of Independence, the Constitution, the First Amendment thereto, as well as Code of Alabama § 16-1-20.1.

32(h). The allegations contained in Paragraph 32(h) of the Plaintiff's Second Amended Complaint are denied.

32(i). The allegations contained in Paragraph 32(i) of the Plaintiff's Second Amended Complaint are based on an alleged statute which is not the law of Alabama, and therefore denied.

32(j)(k)(l)(m). The allegations contained in Paragraphs 32(j), 32(k), 32(l) and 32(m) are denied.

32(n). The Governor of Alabama is without knowledge sufficient at this time to form a belief as to the truthfulness of the allegations contained in Paragraph 32(n) of the Plaintiff's Second Amended Complaint.

32(o). The allegations in Paragraph 32(o) of the Plaintiff's Second Amended Complaint are denied.

ANSWER TO SECOND CLAIM OF RELIEF

The allegations contained in the Plaintiff's Second Claim of Relief in his Second Amended Complaint are denied.

ANSWER TO THIRD CLAIM OF RELIEF

The allegations contained in the Plaintiff's Third Claim of Relief in his Second Amended Complaint are denied.

ANSWER TO FOURTH CLAIM OF RELIEF

The allegations contained in the Plaintiff's Fourth Claim of Relief in his Second Amended Complaint are denied.

ANSWER TO FIFTH CLAIM OF RELIEF

The allegations contained in the Plaintiff's Fifth Claim of Relief in his Second Amended Complaint are denied.

ANSWER TO SIXTH CLAIM OF RELIEF

The allegations contained in the Plaintiff's Sixth Claim of Relief in his Second Amended Complaint are denied.

ANSWER TO SEVENTH CLAIM OF RELIEF

The allegations contained in the Plaintiff's Seventh Claim of Relief in his Second Amended Complaint are denied.

ANSWER TO EIGHTH CLAIM OF RELIEF

The allegations contained in the Plaintiff's Eighth Claim of Relief in his Second Amended Complaint are denied.

ANSWER TO NINTH CLAIM OF RELIEF

The allegations contained in the Plaintiff's Ninth Claim of Relief in his Second Amended Complaint are denied.

THE GOVERNOR OF ALABAMA'S FIRST AFFIRMATIVE DEFENSE

By the authority of the Most High God, Whose authority is recognized by the Declaration of Independence, the Constitution of the United States of America, the First Amendment thereto, and the Alabama Law respecting prayer in the schools, neither this Court nor any court has jurisdiction over the prayers of the people of God.

FOB JAMES, III
Attorney for Defendant

By: /s/ Fob James, III
FOB JAMES, III

[Certificate of Service Omitted in Printing]

[TESTIMONY FROM THE PRELIMINARY INJUNCTION HEARING AUGUST 2, 1982]

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[51] DONALD G. HOLMES,

the witness, called on behalf of the Plaintiffs, having been first duly sworn, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q Senator Holmes, will you state your name?

A Senator Donald G. Holmes, Calvin County State Senator, District 20.

Q How long have you been a state senator?

A Four years.

Q Four years?

A Yes, I served one term in the House, three years in the House of Representatives, and my first term in the State Senate.

Q When did that term begin in the State Senate?

[52] A 1979, right after the general election in 1978.

Q Are you familiar with the lawsuit at issue here today?

A Mr. Williams, I got the subpoena Friday morning and it read Fob James. I don't know, sir, your Honor, if it is concerning the Governor's bill or the one I introduced in 1981, but I read something about the lawsuit, yes.

Q All right, that is fine. It does, in fact, involve the Governor's bill and the one that you sponsored also. Okay.

Do you have a copy of the Governor's bill before you?

A No, I do not.

MR. COODY: No objection to the authenticity of the document, your Honor.

THE COURT: Mr. Shirling, do you have any objection to the certified copy of the act?

MR. SHIRLING: Is this a copy?

THE COURT: The original is on file with the Court, the certification.

MR. SHIRLING: The same objection.

THE COURT: He did not object.

MR. SHIRLING: I thought you said you objected to the authenticity.

[53] MR. COODY: No, I did not.

MR. SHIRLING: No objection.

Q Senator Holmes, I would like to show you the Senate Bill Eight, Act 82735, and ask you a few questions about them, please, sir.

Have you had an opportunity to read over that particular bill?

A Yes.

Q Are you familiar with that bill?

A Yes, I read it several times before when it came on the floor of the State Senate for debate.

Q Were you present during the debate of that particular bill?

A Yes, I was.

Q Could you give the Court the flavour [*sic*] of that debate basically?

A Mr. Williams, I voted for the Voluntary Prayer Bill, Senate Bill Eight as enrolled and enacted just as I supported and voted for mine, the one I wrote and authored in 1981.

I do recall vaguely some debate on the bill when it came up on the Senate Floor.

Q Could you give the Court the flavour of that debate basically?

[54] MR. COODY: We object on the grounds of hearsay. There is no maintained or kept formal legislative history for the State of Alabama. While we have the deepest respect for Senator Holmes, his ability and recollection of what he would testify to, remains to be hearsay.

THE COURT: I think he can testify as to what he said and did.

MR. COODY: Yes, sir. I'm talking about the debate of the other members of the Legislature.

Q Senator Holmes, did you speak on the Senate Floor either opposing or in favor of this particular bill?

A Yes, sir, I spoke in favor of this bill just like I did mine in 1981.

Q Could you give to the Court to the best of your recollection the content of your speech before Senate body?

A On this particular bill here, sir?

Q Yes, Senate Bill Eight.

A I mentioned during the debate in question there were just a few and, your Honor, it is hard to recall seven or eight months ago, but I'll do my very best.

In regard to the Voluntary Prayer Bill that Governor James put before the Legislature at that time, we had discussed the bill that I had passed in 1981 and also in [55] the direction of the bill that the Governor had introduced in the Special Session, and I think—I do not recall absolutely—but the bill was amended upon the floor.

Now whether we had the words "may," "may pray and may lead," there was question by the other senators about that.

Q Okay, Senator. Was there any question in your mind as to the purpose of this particular bill, Senate Bill Eight?

MR. SHIRLING: Judge, I object to what his intention was or his understanding or the purpose of the document.

The document will speak for itself.

THE COURT: I agree with that. The public record of the regular session reports the point of personal privilege and apparently Mr. Holmes made a statement which is a matter of public record, is that what you are driving at?

MR. WILLIAMS: No, your Honor, that deals with Mr. Holmes' 1981 bill.

Right now we are concerned with Senate Bill Eight, the bill introduced by the Governor.

Q Do you recall who sponsored Senate Bill Eight in the Senate?

A Senator Callahan.

[56] Q Did Senator Callahan make any remarks in introducing this bill to the Senate?

MR. COODY: We would object to the contents of that.

THE COURT: I don't think he has yet asked him that.

MR. COODY: He has not.

A Sir?

THE COURT: He has not asked you what Senator Callahan said. He asked you if he made any remarks.

A Yes, he did.

Q Senator, why did you support this particular bill?

A Why?

Q Yes.

A Because I believe in the concept of voluntary prayer in our public schools. There are many reasons for that and I will do my very best, sir, to give you the straightforward answer that I come here today to give you.

Q And that is exactly what we want. So when you voted for this particular bill, your main purpose in voting for this bill was to support the concept of voluntary prayer in public schools, is that correct?

MR. SHIRLING: I object to leading the witness. It is a witness he called and he is testifying [57] at this point, your Honor.

THE COURT: Try not to lead your witness.

MR. WILLIAMS: Your Honor, Senator Holmes is called not necessarily as a witness on behalf of the plaintiffs.

THE COURT: Nobody makes anybody their witness for the purpose of interrogation. If you feel you are not getting the answers that you think you are entitled to, then you may lead but until there is a showing that

it is necessary, I don't think we need to engage in that. Let the witness testify.

MR. WILLIAMS: Okay. Thank you.

Q So what was your primary purpose in voting for this bill, Senator Holmes?

MR. COODY: We object. I believe the Court has ruled he cannot state his intent at the particular time he voted.

THE COURT: I think he can express his feelings of why he did what he did. Go ahead.

A Mr. Williams, I voted for the Voluntary Prayer Bill that Governor James has because I am concerned and I support voluntary prayer as many people throughout the State of Alabama do, and I was the author of Voluntary Prayer or Silent Meditation Prayer in 1981 and I have not changed my [58] position on that.

Q Did you have any reservations about Senate Bill Eight, any reservations at all?

A Well, sir, I am not a constitutional lawyer and I'm not a lawyer, but in my research in the prior years, correct me if I'm wrong, there was some thought that several of us may be talked about on the prescribed prayer or a stated prayer, but after the amendment was put into the bill on the Senate Floor there was the use of the word "may" in those cases as we see in the bill and I had no reservations, no, sir.

Q Do you have before you, Senator Holmes, the bill that you mentioned you co-sponsored in 1981?

A I did not co-sponsor. I was the prime sponsor.

Q Do you have a copy of that particular bill?

A Yes, sir, I do.

Q Senator Holmes, could you read for the record, please, the content of that particular bill, 16-1-20.1?

A I have the copy of the law part insert. Shall I read the Section One there? Is that what you want me to do?

Q Yes.

A "At the commencement of the first class of each day in all grades and all public schools, the teacher in

charge of the room in which each such class is held may announce [59] that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer and during any such period no other activity shall be engaged in."

Q And you say you were the sponsor of that particular bill?

A Yes, I was. Yes, I am.

Q Why did you sponsor that particular bill?

What was the motivating factor behind your sponsoring that bill?

A Certainly I'm motivated by many factors. My heritage, my upbringing, if you will, if I can use that word, Judge, and also the people in the State of Alabama and the people in my district.

Since the 1960's I've seen legislation or a lot of talk about prayer in schools. I had prayer in school when I was in the Sixth Grade. I still have my Sixth Grade Bible that my teacher gave me. And during the course of time in talking with people throughout my district and other parts of Alabama, several people asked me my opinion. I told them and they said, "Why don't you introduce a Voluntary Prayer Bill?"

At that particular time—I do stand corrected. At that time all we had was a silent meditation law on the books and so I started working, investigating to the best of [60] my ability with the limited resources I do have at my disposal, in trying to learn and hopefully draft a good piece of legislation for the State of Alabama concerning voluntary prayer.

Q Do you see any difference other than the specific prayer mentioned in Governor James' bill and the bill you sponsored back in 1981?

A There is some difference, yes. He has the worded prayer written out and my bill only says "may announce, may have prayer or silent meditation."

Q But other than the specific prayer in the Governor James' bill, is there any difference in your bill of 1981 and Senate Bill Eight?

MR. SHIRLING: I object to any difference. He has asked him his opinion of what the difference was and now the difference between the two bills. The documents will speak for themselves.

THE COURT: I think that's correct.

Q Okay, Senator Holmes, do you know who sponsored your bill in the Alabama House in 1981?

A My good friend and colleague Miss Shelberdine Ward [phonetical], I believe.

Q Was that done before you introduced your bill or after or do you recall?

[61] A I'll have to give you background or history on that, if you like.

Q That will be fine.

A Like I said, I started working on the bill and drafting the legislation and I started in about November. I had a meeting with some people at the Capitol at my disposal and at my request to come and talk with me and discuss voluntary prayer legislation.

We met on December 10 at 2 p.m. at the Capitol and we drafted the legislation and we re-drafted and looked over some other verbiage in the language of the other states and some of the other court decisions and opinions, and then I wrote a letter to the Governor, Governor Fob James, and before that on December the 4 and told him my interest in the Voluntary Prayer Bill in our public schools and that I would like his help and support from the Governor's Office, and any support that he may give me as far as legislative investigation and research.

And I told him that I intended to introduce the bill in the 1981 regular session and the Governor did reply back to me stating that he supported my bill and would be glad to help me any way and would like to include it in his administrative program for the upcoming legislation.

Certainly I was the sponsor in the Senate since I [62] was the author and drafter and someone asked Mrs. Ward to introduce it in the House.

Q Okay. Thank you. Do you recall whether or not you requested what is known as a point of personal privilege when you introduced your 1981 bill?

A I do recall that I did, yes.

Q I would like to show you a copy of that point of personal privilege and I would like to see if you recall that. [Handing]

It is a pretty bad copy but can you make out what is on there?

A Yes, sir, I can make out some of it, yes.

Q Can you read it well enough to read it to the Court, please?

A Yes. The point of personal privilege, "Mr. Holmes requested that the following statement regarding passage in both houses of his bill, Senate Bill Sixteen be spread upon the general, to wit, Mr. President and colleagues of the Senate, I have just received word that the Alabama House of Representatives has passed Senate Bill Sixteen that I introduced in this body in regard to voluntary prayer in public schools. Gentlemen, by passage of this bill by the Alabama Legislature our children in this state will have the opportunity of sharing in the spiritual heritage of this [63] state and this country. The United States as well as the State of Alabama was founded by people who believe in God. I believe this effort to return voluntary prayer to our public schools for its return to us to the original position of the writers of the Constitution, this local philosophies and beliefs hundreds of Alabamians have urged my continuous support for permitting school prayer. Since coming to the Alabama Senate I have worked hard on this legislation to accomplish the return of voluntary prayer in our public schools and return to the basic moral fiber. I strongly urge the Governor to sign that legislative mandate soon, even though this is a far cry from where this country and state stood years ago, it is a beginning and a step in the right direction."

This is a bad copy and this is the best I can do.

Q Thank you. You did very well. So from that point of personal privilege we say the purpose of that is to return voluntary prayer to public schools, the gist of your point of personal privilege is basically to return voluntary prayer into public schools, is that correct?

A Well, I was very happy when the Alabama House of Representatives passed Senate Bill Sixteen and, therefore, clearing both houses of the Legislature and being sent to the Governor. You are asking me if I was supporting voluntary [64] prayer, yes, sir, and I still am.

Q Did you have any non-religious or secular purpose for proposing this particular bill, Senate Bill Sixteen, the 1981 bill?

MR. SHIRLING: Judge, he is asking for a legal conclusion on the part of this witness asking for a purpose and that is a constitutional catch phrase and he is seeking this Court to render an opinion or this opinion to render an opinion on and if he is going to show a secular purpose in that, that is his job to do it or not do it through evidence and not through the opinion of a particular witness.

THE COURT: Well, I don't know about the nature of the objection. I think the statute itself speaks for what it was, voluntary prayer in the school.

And now you have a secular purpose for voluntary prayer. You either have voluntary prayer or you don't have voluntary prayer, and I never knew prayer to be secular.

MR. WILLIAMS: No, but many times, with all due respect, Judge, pieces of legislation have been passed in the past with a religious context but for a secular purpose or stated secular purposes having the effect of a religious purpose, but I'm trying to find [65] out from this witness whether or not there is any other purpose other than his stated purpose of returning voluntary prayer to public schools, whether any other purpose existed at this particular time.

THE COURT: Can you answer that?

Q Whether you had any other purposes other than, as you stated, to return voluntary prayer to public schools, did you have any other purpose in sponsoring this particular legislation?

MR. SHIRLING: I would again object on the grounds that the document speaks for itself. The point of privilege that he has already introduced into evidence states his reason behind what has been done and these documents are sufficient at this point to answer that question.

THE COURT: I overrule. If he can answer the question I will let him answer whether he had any other purpose in mind.

A No, I did not have no other purpose in mind.

MR. WILLIAMS: Okay. Thank you, sir.

THE COURT: Let me interject here. It is your conception of the nature of the bill that was introduced that there was specified what any prayer would be?

THE WITNESS: You're asking me if I thought [66] there might be a specified prayer, your Honor?

THE COURT: I said was there any specification in the bill that you introduced or in the method in which you introduced that would set the tone of such prayer that was voluntarily given.

THE WITNESS: No, sir. My intentions or in thinking and researching, it was to draft a piece of legislation as the bill is in final form and passed into law completely voluntary with the meditation which is not necessarily a religious act or a prayer, but it could be in word or thought. It was very permissive and nothing mandatory upon the teacher nor the children.

MR. WILLIAMS: Okay, thank you, Senator Holmes. That will be all.

THE WITNESS: May I leave?

MR. COODY: I have a few questions.

Your Honor, before proceeding I would like to point out that I am proceeding on the basis that the Court will entertain the basis for the summary judgment at a later date.

CROSS EXAMINATION

BY MR. COODY:

Q Senator, one thing I think has been skipped over in your bill. Does it not require only one thing and that is [67] superior to silence, is that correct?

A No, sir, my bill does not require anything. It says, "May announce that a period of silence—

Q All right, sir. But the teacher cannot under your bill say a prayer, is that your statement about that?

A That's my judgment about the bill.

Q So anything that is done is going to be done silently?

A What do you mean, by the teacher or the students?

Q Well, by the students.

A It may be silently or it may not.

Q Senator, in your judgment did this statute contain any provision which would require the State Board of Education or the State Superintendent to enforce or implement it?

A Nothing in this bill that I passed, the one I wrote and passed, no.

Q One final question. Senator, in your talking to your constituents and other people in the state, did you find that there was any misunderstanding on their part that led them to conclude that they were prohibited from saying a prayer in school?

A State that again, please?

Q In your conversations with your constituents or [68] other people throughout the state, did you find that there was a misunderstanding on their part that led to a belief or a fear that they were prohibited from saying a prayer in school?

A Yes.

MR. WILLIAMS: Objection, your Honor. It calls for a hearsay conclusion.

MR. COODY: He answered the question, Judge.

THE COURT: I think he could give the underlying information that developed the position that he took in regard to the matter, and that's what I perceive that he is doing.

Q And, therefore, Senator, was part of your intention in passing this law or presenting this law to the Legislature for passage to tell the people in the state that there is nothing wrong if you want to be in a school building and say a prayer?

A That was my intention with the bill, that they may do that.

REDIRECT EXAMINATION

BY MR. WILLIAMS:

Q Senator, did the earlier bill, the bill that you amended, 16-1-20, did that bill not give that same indication to teachers and students?

[69] A I'm sorry, I don't remember 16—what?

Q Your bill amended an earlier bill that provided for silent meditation, is that correct?

A Yes, if you are referring to the code, that's all we had on the books at that time, it was silent meditation, one minute.

Q That's correct.

A Okay.

Q The only thing your bill changed was the voluntary prayer aspect, is that correct?

A It added the word "or" O-R "voluntary prayer".

MR. WILLIAMS: Okay. Okay. Thank you.

RECROSS EXAMINATION

BY MR. COODY:

Q Senator, the silent meditation statute, do you recall whether or not it has the word "shall," "The teacher shall announce," and did not your bill change that to "may announce"?

A Sir, I think I remember that but I would have to go back and look at the code myself. I don't have those notes in front of me.

(The Court handing)

A Yes, it has "shall" and we put the word "may".

[70] CROSS EXAMINATION

BY MR. SHIRLING:

Q Senator, I'm Bob Shirling and I represent the people who seek to intervene in this lawsuit saying their rights are being affected by what is going on between the man that brought the suit and the people that he sued.

In your testimony here today you said that you did a certain amount of research.

A Yes, sir.

Q With regard to prayer in the schools and the basis upon which this country was founded, is that correct?

A Yes, sir.

Q I notice that in your Point of Personal Privilege it has been introduced into evidence here and you say that a belief in God and you have a capital G.

Is there any particular reason why you have a capital G there?

A I think it should be capitalized.

Q Why do you think it should be capitalized?

A Surely, sir, I'm a Christian and I believe in God and he is a supreme being.

Q Is there any difference in the God that you are addressing your Point of Personal Privilege to and the god that was addressed in the research that you did, that the [71] founding forefathers based their belief on?

A Our forefathers have the same god I have. That's the only way I know how to answer that.

Q How is the Senate opened each session?

A Just like the U.N., Congress and Supreme Court and other places, with a prayer everyday.

Q How is that done, by a particular person or directed to a particular person, how is that handled?

A Each day the Lieutenant Governor opens the session when the Senate comes in and the Lieutenant Governor and we as senators may have guests and invite ministers or preachers all over the State of Alabama to come and be our guest and open the Alabama Senate with a prayer.

Q Is there any law that says that the Senate has to be opened with a prayer?

A Not to my knowledge, no, sir.

Q Is anyone required to pray?

A No. We sure need it.

Q Have you ever noticed any ostracism or criticism of any particular person who may or may not pray in the Senate?

A Not a bit. I felt very strong that we have tens of thousands of school children coming down there a day and these folks are going to be our leaders someday and we have the American flag and I think we should be out in the front [72] and let these folks see, you know, hopefully statesmen and leaders they have in Montgomery and also in Washington, but there is no requirement.

Q I believe you stated you had been a member of the State House of Representatives.

A Yes.

Q For how long?

A An unexpired term, three full regular sessions, three years.

Q How is the House of Representatives opened each session?

A Opened by prayer.

Q I say session, are you referring to each day?

A Each legislative day, yes, sir.

Q How is that conducted?

A In the same manner as—almost in the same manner as the Senate.

Q Have you noticed any criticism or ostracism of people in the House of Representatives who do pray or who do not pray?

A No, sir, I have not.
Q Is it mandatory that they do pray?
A No, sir.
MR. SHIRLING: Thank you, sir.

• • • •

[U.S. DISTRICT COURT, S.D. ALA.
PLAINTIFF'S EXHIBIT NO. 3 AUGUST 2, 1982]

SIGNING OF BILLS

The President of the Senate, in the presence of the Senate, after the reading thereof at length had been dispensed with by a two-thirds vote of a quorum of the Senate present, and immediately after their titles had been publicly read at length by the Secretary of the Senate, signed the foregoing bills, the titles of which are set out in the foregoing Message from the House.

POINT OF PERSONAL PRIVILEGE

Mr. Holmes requested that the following statement, regarding passage through both Houses of his Bill, S. B. 60, be spread upon the Journal, to-wit:

Mr. President and colleagues of the Senate. I have just received word that the Alabama House of Representatives has passed Senate Bill 60, that I introduced in this body, in regard to voluntary prayer in public schools.

Gentlemen, by passage of this bill by the Alabama Legislature, our children in this state will have the opportunity of sharing in their spiritual heritage of this state and this country.

The United States as well as the state of Alabama was founded by people with a belief in God.

I believe this effort to return voluntary prayer to our public schools, for it would return us to the original position of the writers of the Constitution. . . . that is, local philosophies and beliefs.

Hundreds of Alabamians have urged my continued support for permitting school prayer. Since coming to the Alabama Senate, I have worked hard on legislation to accomplish the return of voluntary prayer in our public schools and to return to basic moral fiber.

I strongly urge the Governor to sign this legislative mandate soon. Even though this is a far cry from where this country and state were many years ago, it is a beginning and a step in the right direction.

FILED
JUL 3 1984
ALEXANDER L. STEVAS
CLERK

Nos. 83-812 and 83-929

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WALLACE, *et al.*,

Appellants

v.

JAFFREE, *et al.*,

Appellees

and

SMITH, *et al.*,

Appellants

v.

JAFFREE, *et al.*,

Appellees

Appeal from the United States Court of Appeals for the Eleventh Circuit

---

APPENDIX TO BRIEF OF APPELLANT, GEORGE C. WALLACE

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APPENDIX A

Committee Report to Congress April 1785

28 Journal of the Continental Congress 251-256 *
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[Report of the committee consisting of Mr. Pierse Long, Mr. Rufus King, Mr. David Howell, Mr. William Samuel Johnson, Mr. R. R. Livingston, Mr. Archibald Stewart, Mr. Joseph Gardner, Mr. John Henry, Mr. William Grayson, Mr. Hugh Williamson, Mr. John Bull and Mr. William Houstoun.]

An Ordnance [sic] for ascertaining the mode of disposing of lands in the Western territory.

Be it ordained by the United States in Congress assembled that the territory ceded by individual States to the United States which has been purchas'd of the Indian inhabitants, shall be dispos'd of in the following manner:

Thirteen or more surveyors shall be appointed by *the Geographer of the United States who shall be approved of by Congress and who shall enter into bond with good security, the sufficiency of which shall be determined by the said Geographer conditioned for the faithful discharge of their duty respectively* [Congress who shall take an Oath for the faithful Discharge of their Duty to be administered by the Geographer who is hereby impowered to administer the same] and if any surveyor being [appointed *shall be unable to act from any cause whatever* as afsd shall decline or become incapable to discharge his Duty] the Geographer shall appoint another in his place.

The Geographer (under whose direction the said surveyors shall act) shall form such regulations for their conduct as he shall deem necessary, and shall have authority to suspend them *from Office until Congress shall*

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* Words struck through in original document have been reprinted in italics.

be informed thereof to direct the proper inquirys [for misconduct in Office and shall make Report of the same to Congress.]

The Survivors shall proceed to divide the said territorys into townships of *seven* miles square, by lines running due North and South and others crossing these at right angles, unless where the boundaries of the late Indian purchase may render the same impracticable, and then departing from this *instruction* Rule no farther than such particular circumstances may require.

The Geographer shall be allowed dollars p annum for his salary.

There shall be allowed for the surveying of every township dollars, including the wages of chain carriers, markers and every other expense and so in proportion for a part of a township.

The first Line running North and South as aforesaid shall begin on the Ohio, at a point that shall be found to be due North from the termination of a line which has been run as the Southern boundary of the State of Pennsylvania, and the first line running East and West shall begin at the same point, and shall extend throughout the whole territory. The Geographer shall designate the Townships or parts of townships by numbers progressively from South to North, always beginning each Range with No. 1 [and the Ranges shall be distinguished by their progressive numbers to the Westward, the first Range extending from the Ohio to the Lake Erie, being marked No. 1.]

The lines shall be measured with a chain, shall be plainly marked by chops on the trees and exactly described on a plat whereon shall be noted at their proper distance all water courses, mountains and other remarkable and permanent things over or near which such lines shall pass.

The Plats of the districts respectively shall be subdivided [as the Case may require] into sections of one mile square, or 640 acres, in the same direction as the external lines, and numbered from one to 49, always beginning the succeeding range of sections with the number next to that with which the preceeding one concluded and where from the causes before mentioned only a part of a township shall be surveyed, the sections protracted thereon shall bear the same numbers as if the Township had been intire [and those Sections shall be subdivided into Lots of 320 as.]

The Geographer and surveyors *under his direction* shall pay the utmost attention to the variation of the magnetic needle, and shall run and note all lines by the true meridian, certifying with every platt what was the variation at the times of running the lines thereon noted.

As soon as *four* ranges of townships and parts of townships in the direction from South to North shall have been survey'd, the Geographer shall transmit plats thereof to the Commrs. of the Treasury, who shall record the same with the report in well bound books to be kept for that purpose. The Secretary at War shall take by lot therefrom a number of townships and parts of townships equal to one part of the whole for the use of the late Continental Army, to be applied in manner herein after directed. The Commrs. of the Treasury shall then cause the remaining numbers to be *drawn* for in the name of the thirteen states, according to *such proportions as nearly as may be as are alloted in rating the Quotas of the different States* [the Quotas in the last preceding Requisition on the States,] provided if more land than its Proportion is allotted for sale in any *one individual state than a due proportion* [State] at any *one* division a deduction be made therefor at the *one* next *succeeding* [*division*].

The Commrs shall transmit duplicates of the said original plats so *drawn* for, to the loan Officer of the

individual States respectively, who after giving proper notice shall proceed to sell the same at public vendue, excepting only such townships and parts of townships as may be herein after particularly reserved provided that none of the lands within the said territory be sold under the price of one dollar the acre to be paid in specie or loan Office certificates reduced to specie value by the scale of depreciation or certificates of liquidated debts of the United States, besides the expence of the survey and other proceedings thereon, which are hereby rated at *forty* dollars the township in specie or certificates as aforesaid and so in the same proportion for a part thereof.

When any Township or part of a township shall have been sold as aforesaid and the money or Certificates received therefor, the loan Officer shall deliver a deed in the following terms:

To all whom these presents shall come greeting:

Know ye that for *a valuable consideration* [the consideration of] the United States of America have granted unto C. D. the Township or part of Township numbered to hold to the said C. D. his heirs and assigns for ever, subject nevertheless to such reservations as are contained in an ordinance bearing date the day of in the year

In witness whereof the said A. B. loan Officer of the said State hath hereunto set his hand and affix'd the seal of his office this day of in the year and of the independance of the United States the which deeds shall be recorded in proper books, & shall be certified to have been recorded previous to *the delivery* its being delivered to the purchasers.

The loan Officers respectively shall make returns to the Commrs. of the Treasury every *three* months of the sales of the townships or parts of townships committed to their charge with the persons' names to whom sold; and shall transmit all sums of money or certificates as

aforesaid received for the same, which shall be duly entered in the books of the treasury.

If any township or part of township remains unsold for six months after the platt shall have been receiv'd by the loan Officer, the same shall be return'd to the Comm. of the Treasy and shall be sold in such manner, as Congress may hereafter direct *in which case the said Commrs. shall grant deeds for the same.*

There shall be reserv'd for the United States out of every Township the four corner sections being numbered, and out of every part of a township so many sections of the same numbers as shall be found thereon.

Also one part of all gold, silver, lead, Copper and Coal mines, and all salt licks and salt springs and a square of one hundred acres of land, of which the said salt lick or salt spring shall be the centre for the purpose of special sales at such times and places as Congress may hereafter direct.

There shall be reserv'd the Central section of every township for the maintenance of public schools and the *lot* [Section] immediately adjoining the same to the Northward, for the support of religion, the *revenues* [Profits] arising therefrom in both instances to be applied for ever according to the will of the majority of male residents of full age within the same. And whereas Congress by their resolutions of Sept. 16 and 18, in the year 1776, and the 12 of Aug., 1780, stipulated grants of land to the Officers and soldiers who had engaged or should engage in the service of the United States during the war and continue therein to the close of the same or until discharg'd by Congress and to the representatives of such Officers and soldiers as should be slain by the Enemy, in the following proportions to wit:

To a Majr. Genl. 1,100 acres; to a Brigr. 850. to a Colonel 450, to a Major 400—to a Capt. 300. to a Lieut. 200 to an Ensign 150—and to a non commd. Soldier 100.

for complying therefore with such *stipulation* [engagements] be it ordained that the Secretary at War from the returns in his Office or such other sufft evidence as the nature of the case may *require* [admit] determine who are the objects of the above resolutions and the quantity of land to which such persons or their representatives are respectively intituled and shall cause the Townships or parts of Townships hereinbefore reserv'd for the use of the late Continental Army to be drawn for in such manner as he shall deem expedient to answer the purpose of an impartial distribution.

He shall from time to time transmit certificates difficult of imitation to the loan officers of the different States to the lines of which the Military claimants respectively belong, specifying the name and rank of the party the terms of his engagement and time of his service and the division Brigade regiment or company to which he belong'd, the quantity of land he *has a title to receive* is intituled to, and the *District* Township out of which his portion is to be *assigned* taken.

The loan Officers shall execute deeds for such undivided *moieties* [Proportions] in manner and form herein before mentioned, varying only in such a degree as to make the same conformable to the Certificate from the Secretary at War.

Where any Military claimants of bounty [in Lands] shall not belong to the Line of any particular State similar certificates shall be sent to the Commrs. of the Treasury, who shall execute deeds to the parties for the same.

The Comrs. of the Treasury and loan Officers in the States shall within 12 months return receipts to the Secy. at War for all deeds which have been delivered, as also all the original deeds which remain in their hands for want of applicants which deeds so returned shall be preserv'd in the Office until the parties or their repre-

sentatives require the same, [saving and confirming always to all Officers and Soldiers entitled to Lands on the Northern Side of the Ohio, by donation or Bounty from the Commonwealth of Virginia and to all Persons claiming under them all Rights to which they are so entitled by the Laws of the said State and the Acts of Congress accepting the Cession of Western Territory from the said State.][1]

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[1] This draft, in the writing of William Grayson, except the part in brackets which is in the writing of Hugh Williamson, is in the *Papers of the Continental Congress*, No. 56, folios 451-465. It was read this day and April 14 assigned for consideration. See *post* May 20.

Act of May 20, 1785

1 Laws of the United States 563 (1815)

CHAPTER 32.

An ordinance for ascertaining the mode of disposing of lands in the Western Territory.

Be it ordained by the United States in congress assembled, That the territory ceded by individual states, to the United States, which has been purchased of the Indian inhabitants, shall be disposed of in the following manner:

A surveyor from each state shall be appointed by congress, or a committee of the states, who shall take an oath for the faithful discharge of his duty, before the geographer of the United States, who is hereby empowered and directed to administer the same; and the like oath shall be administered to each chain carrier, by the surveyor under whom he acts.

The geographer, under whose direction the surveyors shall act, shall occasionally form such regulations for their conduct, as he shall deem necessary; and shall have authority to suspend them for misconduct in office, and shall make report of the same to congress, or to the committee of the states; and he shall make report in case of sickness, death, or resignation, of any surveyor.

The surveyors, as they are respectively qualified, shall proceed to divide the said territory into townships of six miles square, by lines running due north and south, and others crossing these at right angles, as near as may be, unless where the boundaries of the late Indian purchases may render the same impracticable, and then they shall depart from this rule no farther than such particular circumstances may require. And each surveyor shall be allowed and paid at the rate of two dollars for every mile in length he shall run, including the wages of chain car-

riers, markers, and every other expense attending the same.

The first line running north and south as aforesaid, shall begin on the river Ohio, at a point that shall be found to be due north from the western termination of a line which has been run as the southern boundary of the state of Pennsylvania: and the first line running east and west, shall begin at the same point, and shall extend throughout the whole territory; provided, that nothing herein shall be construed, as fixing the western boundary of the state of Pennsylvania. The geographer shall designate the townships or fractional parts of townships, by numbers, progressively, from south to north; always beginning each range with No. 1; and the ranges shall be distinguished by their progressive numbers to the westward. The first range, extending from the Ohio to the lake Erie, being marked No. 1. The geographer shall personally attend to the running of the first east and west line; and shall take the latitude of the extremes of the first north and south line, and of the mouths of the principal rivers.

The lines shall be measured with a chain; shall be plainly marked by chaps on the trees, and exactly described on a plat; whereon shall be noted by the surveyor, at their proper distances, all mines, salt springs, salt licks, and mill seats, that shall come to his knowledge; and all water courses, mountains, and other remarkable and permanent things, over or near which such lines shall pass, and also the quality of the lands.

The plats of the townships, respectively, shall be marked, by subdivisions, into lots of one mile square, or 640 acres, in the same direction as the external lines, and numbered from 1 to 36; always beginning the succeeding range of the lots with the number next to that with which the preceding one concluded. And where, from the causes beforementioned, only a fractional part of a town-

ship shall be surveyed, the lots protracted thereon shall bear the same numbers as if the township had been entire. And the surveyors, in running the external lines of the townships, shall, at the interval of every mile, mark corners for the lots which are adjacent, always designating the same in a different manner from those of the townships.

The geographer and surveyors shall pay the utmost attention to the variation of the magnetic needle, and shall run and note all lines by the true meridian, certifying with every plat what was the variation at the times of running the lines thereon noted.*

As soon as seven ranges of townships, and fractional parts of townships, in the direction from south to north, shall have been surveyed, the geographer shall transmit plats thereof to the board of treasury, who shall record the same, with the report, in well bound books to be kept for that purpose. And the geographer shall make similar returns, from time to time, of every seven ranges, as they may be surveyed. The secretary of war shall have recourse thereto, and shall take by lot therefrom a number of townships and fractional parts of townships, as well from those to be sold entire, as from those to be sold in lots, as will be equal to one-seventh part of the whole of such seven ranges, as nearly as may be, for the use of the late continental army; and he shall make a similar draught, from time to time, until a sufficient

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* On motion by Mr. King, seconded by Mr. Hornblower,

Whereas the ordinance for ascertaining the mode of disposing of lands in the western territory, directs "That the geographer and surveyors shall pay the utmost attention to the variation of the magnetic needle, and shall run and note all lines by the true meridian, certifying with every plat what was the variation at the times of running the lines thereon noted;" which direction will greatly delay the survey of the said territory;

Resolved, That the above recited clause in the said ordinance be, and the same hereby is, repealed.

quantity is drawn to satisfy the same, to be applied in manner hereinafter directed.† The board of treasury shall, from time to time, cause the remaining numbers, as well those to be sold entire as those to be sold in lots, to be drawn for, in the name of the thirteen states, respectively, according to the quotas in the last preceding requisition on all the states: provided, that in case more land than its proportion is allotted for sale in any state at any distribution, a deduction be made therefor at the next.‡

The board of treasury shall transmit a copy of the original plats, previously noting thereon the townships

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‡ On a report of the board of treasury, to whom it was referred to report a plan for selling, for public securities, the townships surveyed in the western territory:

Resolved, That after the secretary of war shall have drawn for the proportionate quantity of the lands already surveyed, which were assigned to the late army, agreeably to the ordinance of the 20th of May, 1785, the remainder shall be advertised for sale in one of the newspapers, at least, of each of the states, and at the expiration of five months from this day, the sale of the land shall commence in the place where congress shall sit, and continue, from day to day, until the same shall be disposed of: provided, that none of the land shall be sold at a less price than one dollar per acre, and that the sale shall be made agreeably to the mode pointed out by the ordinance aforesaid.

Resolved, That one-third of the purchase money shall be immediately paid, in any of the public securities of the United States, to the treasurer of the said states, and that the remaining two-thirds shall be paid, in like manner, in three months after the date of the sale; on which payment (a certificate thereof being previously furnished by the treasurer to the board of treasury,) titles to the lands shall be given to the purchasers by the board of treasury, agreeably to the terms prescribed by the said ordinance: provided, that if the second payment shall not be made in three months as aforesaid, the first payment shall be forfeited, and the land shall again be exposed to sale.

Ordered, That the board of treasury take the necessary measures for carrying the aforesaid resolution into effect, and also for exhibiting the surveys of the lands.

and fractional parts of townships, which shall have fallen to the several states, by the distribution aforesaid, to the commissioners of the loan office of the several states, who, after giving notice of not less than two, nor more than six, months, by causing advertisements to be posted up at the court houses or other noted places in every county, and to be inserted in one newspaper published in the states of their residence, respectively, shall proceed to sell the townships or fractional parts of townships, at public vendue, in the following manner, viz: the township or fractional part of a township No. 1, in the first range, shall be sold entire; and No. 2, in the same range, by lots; and thus, in alternate order, through the whole of the first range. The township or fractional part of a township No. 1, in the second range, shall be sold by lots; and No. 2, in the same range, entire; and so, in alternate order, through the whole of the second range; and the third range shall be sold in the same manner as the first, and the fourth in the same manner as the second; and thus, alternately, throughout all the ranges: provided, that none of the lands within the said territory be sold under the price of one dollar the acre, to be paid in specie or loan office certificates, reduced to specie value by the scale of depreciation, or certificates of liquidated debts of the United States, including interest, besides the expense of the survey and other charges thereon, which are hereby rated at thirty-six dollars the township, in specie or certificates as aforesaid, and so, in the same proportion, for a fractional part of a township or of a lot, to be paid at the time of sales, on failure of which payment the said lands shall again be offered for sale.

There shall be reserved for the United States out of every township, the four lots, being numbered 8, 11, 26, 29, and out of every fractional part of a township, so many lots of the same numbers as shall be found thereon, for future sale. There shall be reserved the lot No. 16, of every township, for the maintenance of public schools

within the said township; also, one-third part of all gold, silver, lead, and copper, mines to be sold, or otherwise disposed of, as congress shall hereafter direct.

When any township, or fractional part of a township, shall have been sold as aforesaid, and the money or certificates received therefor, the loan officer shall deliver a deed in the following terms:

The United States of America, to all to whom these presents shall come, greeting:

Know ye, that for the consideration of —— dollars, we have granted, and hereby do grant and confirm, unto ————, the township (or fractional part of the township, as the case may be) numbered ——, in the range ——, excepting therefrom, and reserving, one-third part of all gold, silver, lead, and copper mines, within the same; and the lots No. 8, 11, 26, and 29, for future sale or disposition, and the lot No. 16, for the maintenane of public schools. To have to the said ————, his heirs and assigns, forever; (or, if more than one purchaser, to the said ————, their heirs and assigns, forever, as tenants in common.) In witness whereof, A.B. commissioner of the loan office in the state of ————, hath, in conformity to the ordinance passed by the United States, in congress assembled, the twentieth day of May, in the year of our Lord 1785, hereunto set his hand and affixed his seal, this —— day of ———, in the year of our Lord, ——, and of the independence of the United States of America ———.

And when any township, or fractional part of a township, shall be sold by lots as aforesaid, the commissioner of the loan office shall deliver a deed therefor in the following form:

The United States of America, to all to whom these presents shall come, greeting:

Know ye, that for the consideration of —— dollars, we have granted, and hereby do grant and confirm, unto

————————, the lot (or lots, as the case may be, in the township or fractional part of the township, as the case may be) numbered ——, in the range ——, excepting and reserving one-third part of all gold, silver, lead, and copper mines, within the same, for future sale or disposition. To have to the said ————————, his heirs and assigns, for ever; (or, if more than one purchaser, to the said ————————, their heirs and assigns, forever, as tenants in common.) In witness whereof, A.B. commissioner of the continental loan office in the state of ————, hath, in conformity to the ordinance passed by the United States in congress assembled, the twentieth day of May, in the year of our Lord 1785, hereunto set his hand and affixed his seal, this —— day of ———, in the year of our Lord ——, and of the independence of the United States of America ————————.

Which deeds shall be recorded in proper books, by the commissioner of the loan office, and shall be certified to have been recorded, previous to their being delivered to the purchaser, and shall be good and valid to convey the lands in the same described.

The commissioners of the loan offices, respectively, shall transmit to the board of treasury, every three months, an account of the townships, fractional parts of townships, and lots, committed to their charge; specifying therein the names of the persons to whom sold, and the sums of money or certificates received for the same; and shall cause all certificates by them received, to be struck through with a circular punch; and they shall be duly charged in the books of the treasury with the amount of the moneys or certificates, distinguishing the same, by them received as aforesaid.

If any township, or fractional part of a township or lot, remains unsold for eighteen months after the plat shall have been received by the commissioners of the loan office, the same shall be returned to the board of treasury, and shall be sold in such manner as congress may hereafter direct.

And whereas congress, by their resolutions of September 16th and 18th, in the year 1776, and the 12th of August, 1780, stipulated grants of land to certain officers and soldiers of the late continental army, and by the resolution of the 22d September, 1780,* stipulated grants

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* The resolutions of congress of the 16th of September, 1776, here referred to, provide for the raising of eighty-eight battalions, to serve for the war. In addition to a money bounty of twenty dollars to each noncommissioned officer and private soldier, it was resolved, "that congress make provision for granting lands, in the following proportions, to the officers and soldiers who shall engage in the service, and continue therein to the close of the war, or until discharged by congress, and to the representatives of such officers and soldiers, as shall be slain by the enemy.

"Such lands to be provided by the United States, and whatever expense shall be necessary to procure such land, the said expense shall be paid and borne by the states, in the same proportion as the other expenses of the war, viz:

To a colonel	500 acres.
To a lieutenant colonel	450
To a major	400
To a captain	300
To a lieutenant	200
To an ensign	150
Each noncommissioned officer and soldier	100."

On the 18th of September, 1776, the following resolutions were adopted:

"That the bounty and grants of land offered by congress, by a resolution of the 16th instant, as an encouragement to the officers and soldiers to engage to serve in the army of the United States during the war, shall extend to all who are, or shall be, enlisted for that term; the bounty of ten dollars, which any of the soldiers have received from the continent, on account of a former enlistment, to be reckoned in part payment of the twenty dollars offered by the said resolution:

"That no officer in the continental army be allowed to hold more than one commission, or to receive pay but in one capacity, at the same time."

[Continued]

* [Continued]

The resolution of the 12th of August, 1780, referred to, is in the words following:

"That the provision for granting lands, by the resolution of September 16th, 1776, be and is hereby extended to the general officers, in the following proportion:

To a major general, one thousand one hundred acres,

a brigadier general, eight hundred and fifty do."

With respect to the resolution of the 22d of September, 1780, the following appears on the journals of congress:

"Congress resumed the consideration of the report of the committee on the medical department; and, on the consideration of the following paragraph, viz:

"That the several officers, whose pay is established as above, except the clerks and stewards, shall, at the end of the war, be entitled to a certain provision of land, in the proportion following, to wit:

"The director to have the same quantity as a brigadier general; chief physicians and purveyor the same as a colonel; physicians and surgeons, and apothecary, the same as a lieutenant colonel; regimental surgeons and assistants to the purveyor and apothecary, the same as a major; hospital and regimental surgeons' mates, the same as a captain:"

"A motion was made by Mr. Muhlenberg, seconded by Mr. Bland,

"To amend the paragraph, by inserting after the words "entitled to," the words following, viz: "half pay, in the same proportion and under like restrictions a officers of the line."

"And on the question to agree to the amendment,

"The yeas and nays were required, and

"It was resolved in the affirmative.

'On the question to agree to the paragraph, as amended;

The yeas and nays were required, and

"It was resolved in the affirmative.

"Ordered, That the paragraph respecting the pay be recommitted."

To these provisions for military bounties, may be added the following resolution of the 3d of October, 1780:

"And whereas, by the foregoing arrangement,† many deserving officers must become supernumerary, and it is proper that regard be had to them:

"Resolved, That from the time the reform of the army takes place, they be entitled to half pay for seven years, in specie or other

of land to certain officers in the hospital department of the late continental army; for complying, therefore, with such engagements, be it ordained, that the secretary of war, from the returns in his office, or such other sufficient evidence as the nature of the case may admit, determine who are the objects of the above resolutions and engagements, and the quantity of land to which such persons or their representatives are, respectively, entitled, and cause the townships or fractional parts of townships, herein before reserved for the use of the late continental army, to be drawn for in such manner as he shall deem expedient, to answer the purpose of an impartial distribution. He shall, from time to time, transmit certificates to the commissioners of the loan offices of the different states, to the lines of which the military claimants have respectively belonged, specifying the name and rank of the party, the terms of his engagement and time of his service, and the division, brigade, regiment, or company, to which he belonged, the quantity of land he is entitled to, and the township or fractional part of a township and range out of which his portion is to be taken.

The commissioners of the loan offices shall execute deeds for such undivided proportions, in manner and form herein beforementioned, varying only in such a degree as to make the same conformable to the certificate from the secretary of war.

Where any military claimants of bounty in lands shall not have belonged to the line of any particular state, similar certificates shall be sent to the board of treasury, who shall execute deeds to the parties for the same.

The secretary of war, from the proper returns, shall transmit to the board of treasury a certificate, specify-

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current money equivalent, and also grants of land at the close of the war agreeably to the resolution of the 16th of

ing the name and rank of the several claimants of the hospital department of the late continental army, together with the quantity of land each claimant is entitled to, and the township or fractional part of a township and range out of which his portion is to be taken; and thereupon the board of treasury shall proceed to execute deeds to such claimants.

The board of treasury, and the commissioners of the loan offices in the states, shall, within eighteen months, return receipts to the secretary of war, for all deeds which have been delivered, as also all the original deeds which remain in their hands for want of applicants, having been first recorded; which deeds, so returned, shall be preserved in the office, until the parties or their representatives require the same.

And be it further ordained, That three townships adjacent to lake Erie be reserved, to be hereafter disposed of by congress, for the use of the officers, men, and others, refugees from Canada, and the refugees from Nova Scotia, who are or may be entitled to grants of land under resolutions of congress now existing, or which may hereafter be made respecting them, and for such other purposes as congress may hereafter direct.

And be it further ordained, That the towns of Gnadenhutten, Schoenbrun, and Salem, on the Muskingum, and so much of the lands adjoining to the said towns, with the buildings and improvements thereon, shall be reserved for the sole use of the christian Indians, who were formerly settled there, or the remains of that society, as may, in the judgment of the geographer, be sufficient for them to cultivate.*

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* A motion being made in the words following:

"Whereas the United States in congress assembled, have, by their ordinance, passed the 20th of May, 1785, among other things ordained, that the towns of Gnadenhutten, Schoenbrun, and Salem, on the Muskingum, and so much of the lands adjoining to the said towns, with the buildings and improvements thereon, shall

Saving and reserving always, to all officers and soldiers entitled to lands on the northwest side of the Ohio, by donation or bounty from the commonwealth of Virginia, and to all persons claiming under them, all rights to which they are so entitled, under the deed of cession executed by the delegates for the state of Virginia, on the 1st day of March, 1784, and the act of congress accepting the same: and to the end that the said rights may be fully and effectually secured, according to the true intent and meaning of the said deed of cession and act aforesaid, be it ordained, that no part of the land included between the rivers called Little Miami and Scioto, on the northwest side of the river Ohio, be sold, or in any manner alienated, until there shall first have been laid off and appropriated for the said officers and soldiers, and persons claiming under them, the lands they are entitled to, agreeably to the said deed of cession and act of congress, accepting the same.†

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be reserved for the sole use of the christian Indians who were formerly settled there, or the remains of that society, as may, in the judgment of the geographer, be sufficient for them to cultivate:"

Resolved, That the board of treasury and reserve out of any contract that they may make for the tract described in the report of the committee which, on the 23d instant, was referred to the said board to take order, a quantity of land around and adjoining each of the beforementioned towns, amounting, in the whole, to the thousand acres; and that the property of the said reserved land be vested in the Moravian brethren, at Bethlehem, in Pennsylvania, or a society of the said brethren, for civilizing the Indians and promoting christianity, in trust, and for the uses expressed as above in the said ordinance; including Killbuck and his descendants, and the nephew and descendants of the late captain White Eyes, Delaware chiefs, who have distinguished themselves as friends to the cause of America."

Ordered, That the above be also referred to the board of treasury to take order.

‡ On the report of a committee, consisting of Mr. Carrington, Mr. King, Mr. Dane, Mr. Madison, and Mr. Cook, to whom was referred a letter of the secretary of war, of the 26th of April last.

Done by the United States in congress assembled, the twentieth day of May, in the year of our Lord one thousand seven hundred and eighty-five, and of our sovereignty and independence the ninth.

RICHARD H. LEE, *president.*

Charles Thomson, secretary.

[*Note.* The regulations of the preceding ordinance, respecting the transmission of certificates to the commissioners of loans, and the mode of making deeds, have never been carried into effect. *Note of the editor of the Land Laws*, &c.]

Act of July 13, 1787

1 Laws of the United States 475 (1815)

According to order, the ordinance for the government of the territory of the United States northwest of the river Ohio, was read a third time, and passed, as follows:

An ordinance for the government of the territory of the United States northwest of the river Ohio.

Be it ordained by the United States in congress assembled, That the said territory, for the purposes of temporary government, be one district; subject, however, to be divided into two districts, as future circumstances may, in the opinion of congress, make it expedient.

Be it ordained by the authority aforesaid, That the estates both of resident and nonresident proprietors in the said territory, dying intestate, shall descend to, and be distributed among their children, and the descendants of a deceased child, in equal parts; the descendants of a deceased child or grand child to take the share of their deceased parent in equal parts among them; and where there shall be no children or descendants, then in equal parts to the next of kin, in equal degree; and among collaterals, the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parents' share; and there shall, in no case, be a distinction between kindred of the whole and half blood; saving in all cases to the widow of the intestate, her third part of the real estate for life, and one third part of the personal estate; and this law relative to descents and dower, shall remain in full force until altered by the legislature of the district. And until the governor and judges shall adopt laws as herein after mentioned, estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by him or her, in whom the estate may be, (being of full age,) and attested by three witnesses; and real estates may be conveyed by lease and release, or bargain and sale, signed, sealed, and

delivered, by the person, being of full age, in whom the estate may be, and attested by two witnesses, provided such wills be duly approved, and such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts, and registers, shall be appointed for that purpose; saving, however, to the French and Canadian inhabitants, and other settlers of the Kaskaskies, Saint Vincents, and the neighboring villages, who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them, relative to the descent and conveyance of property.

Be it ordained by the authority aforesaid, That there shall be appointed, from time to time, by congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by congress; he shall reside in the district, and have a freehold estate therein, in one thousand acres of land, while in the exercise of his office.

There shall be appointed, from time to time, by congress, a secretary, whose commission shall continue in force for four years, unless sooner revoked; he shall reside in the district, and have a freehold estate therein, in five hundred acres of land, while in the exercise of his office; it shall be his duty to keep and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceedings of the governor in his executive department; and transmit authentic copies of such acts and proceedings, every six months, to the secretary of congress: There shall also be appointed a court, to consist of three judges, any two of whom to form a court, who shall have a common law jurisdiction, and reside in the district, and have each therein a freehold estate, in five hundred acres of land, while in the exercise of their offices; and their commissions shall continue in force during good behavior.

The governor and judges, or a majority of them, shall adopt and publish in the district, such laws of the original states, criminal and civil, as may be necessary, and best suited to the circumstances of the district, and report them to congress, from time to time; which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by congress; but afterwards the legislature shall have authority to alter them as they shall think fit.

The governor for the time being, shall be commander in chief of the militia, appoint and commission all officers in the same, below the rank of general officers, all general officers shall be appointed and commissioned by congress.

Previous to the organization of the general assembly, the governor shall appoint such magistrates and other civil officers, in each county or township, as he shall find necessary for the preservation of the peace and good order in the same. After the general assembly shall be organized, the powers and duties of magistrates and other civil officers shall be regulated and defined by the said assembly; but all magistrates and other civil officers, not herein otherwise directed, shall, during the continuance of this temporary government, be appointed by the governor.

For the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof; and he shall proceed from time to time, as circumstances may require, to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature.

So soon as there shall be five thousand free male inhabitants, of full age, in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect representatives from their counties or townships, to represent them in the general as-

sembly; provided that, for every five hundred free male inhabitants, there shall be one representative, and so on, progressively, with the number of free male inhabitants, shall the right of representation increase, until the number of representatives shall amount to twenty-five; after which the number and proportion of representatives shall be regulated by the legislature; provided, that no person be eligible or qualified to act as a representative, unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years; and in either case, shall likewise hold in his own right, in fee simple, two hundred acres of land within the same; provided also, that a freehold in fifty acres of land in the district, having been a citizen of one of the states, and being resident in the district, or the like freehold and two years residence in the district, shall be necessary to qualify a man as an elector of a representative.

The representatives thus elected, shall serve for the term of two years; and in case of the death of a representative, or removal from office, the governor shall issue a writ to the county or township, for which he was a member, to elect another in this stead, to serve for the residue of the term.

The general assembly, or legislature, shall consist of the governor, legislative council, and a house of representatives. The legislative council shall consist of five members, to continue in office five years, unless sooner removed by congress; any three of whom to be a quorum: and the members of the council shall be nominated and appointed in the following manner to-wit: As soon as representatives shall be elected, the governor shall appoint a time and place for them to meet together, and when met, they shall nominate ten persons, residents in the district, and each possesesd of a freehold in five hundred acres of land, and return their names to congress; five of whom congress shall appoint and commission to

serve as aforesaid: and whenever a vacancy, shall happen in the council, by death or removal from office, the house of representatives shall nominate two persons, qualified as aforesaid, for each vacancy, and return their names to congress; one of whom congress shall appoint and commission for the residue of the term: And every five years, four months at least before the expiration of the time of service of the members of council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to congress; five of whom congress shall appoint and commission to serve as members of the council five years, unless sooner removed. And the governor, legislative council, and house of representatives, shall have authority to make laws, in all cases, for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared. And all bills, having passed by a majority in the house, and by a majority in the council, shall be referred to the governor for his assent; but no bill or legislative act whatever, shall be of any force without his assent. The governor shall have power to convene, prorogue, and dissolve, the general assembly, when in his opinion it shall be expedient.

The governor, judges, legislative council, secretary, and such other officers as congress shall appoint to the district, shall take an oath or affirmation of fidelity, and of office; the governor before the president of congress; and all other officers before the governor. As soon as a legislature shall be formed in the district, the council and house assembled, in one room, shall have authority, by joint ballot, to elect a delegate to congress, who shall have a seat in congress, with a right of debating, but not of voting during this temporary government.

And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws, and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever here-

after shall be formed in the said territory; to provide, also, for the establishment of states, and permanent government therein, and for their admission to a share in the federal councils on an equal footing with the original states, at as early periods as may be consistent with the general interest:

It is hereby ordained and declared, by the authority aforesaid, That the following articles shall be considered as articles of compact, between the original states and the people and states in said territory, and forever remain unalterable, unless by common consent, to wit:

ART. 1. No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments, in the said territory.

ART. 2. The inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with, or affect, private contracts or engagements, bona fide, and without fraud, previously formed.

ART. 3. Religion, morality, and knowledge, being necessary to good government and the happiness of man-

kind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

ART. 4. The said territory, and the states which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the articles of confederation, and to such alterations therein as shall be constitutionally made; and to all the acts and ordinances of the United States in congress assembled, conformable thereto. The inhabitants and settlers in the said territory shall be subject to pay a part of the federal debts, contracted or to be contracted, and a proportional part of the expenses of government, to be apportioned on them by congress, according to the same common rule and measure by which apportionments thereof shall be made on the other states; and the taxes for paying their proportion, shall be laid and levied by the authority and direction of the legislatures of the district or districts, or new states, as in the original states, within the time agreed upon by the United States in congress assembled. The legislatures of those districts, or new states, shall never interfere with the primary disposal of the soil by the United States in congress assembled, nor with any regulations congress may find necessary, for securing the title in such soil, to the bona fide purchasers. No tax shall be imposed on lands the property of the United States; and in no case shall non-resident proprietors be taxed higher than residents. The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to

the inhabitants of the said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor.

ART. 5. There shall be formed in the said territory, not less than three, nor more than five states; and the boundaries of the states, as soon as Virginia shall alter her act of cession, and consent to the same,* shall become fixed and established as follows, to wit: the western state in the said territory, shall be bounded by the Mississippi, the Ohio, and Wabash rivers; a direct line drawn from the Wabash and Post Vincents, due north, to the territorial line between the United States and Canada; and by the said territorial line to the lake of the Woods and Mississippi. The middle states shall be bounded by the said direct line, the Wabash, from Post Vincents to the Ohio, by the Ohio, by a direct line drawn due north from the mouth of the Great Miami to the said territorial line, and by the said territorial line. The eastern state shall be bounded by the last mentioned direct line, the Ohio, Pennsylvania, and the said territorial line: provided however, and it is further understood and declared, that the boundaries of these three states shall be subject so far to be altered, that, if congress shall hereafter find it expedient, they shall have authority to form one or two states in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan. And whenever any of the said states shall have sixty thousand free inhabitants therein, such state shall be admitted, by its delegates, into the congress of the United States, on an equal footing with the original states, in all respects whatever; and shall be at liberty to form a permanent constitution and state government: provided the constitution and government, so to be formed, shall be republican, and in conformity to the principles contained in these articles; and, so far as it can be consistent with

the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the state than sixty thousand.

ART. 6. There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted: provided always, that any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original states, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service as aforesaid.

Be it ordained by the authority aforesaid, That the resolutions of the 23d of April, 1784,† relative to the

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† *Resolved*, That so much of the territory ceded or to be ceded by individual states to the United States, as is already purchased or shall be purchased of the Indian inhabitants, and offered for sale by congress, shall be divided into distinct states in the following manner, as nearly as such sessions will admit; that is to say, by parallels of latitude, so that each state shall comprehend from north to south two degrees of lati

tor; and by meridians of longitude, one of which shall pass through the lowest point of the rapids of Ohio, and the other through the western cape of the mouth of the great Kanhaway; but the territory eastward of this last meridian, between the Ohio, lake Erie, and Pennsylvania, shall be one state, whatsoever may be its comprehension of latitude. That which may lie beyond the completion of the 45th degree, between the said meridians, shall make part of the state adjoining it on the south; and that part of the Ohio, which is between the same meridians, coinciding nearly with the parallel of 39 degrees, shall be substituted so far in lieu of that parallel as a boundary line.

That the settlers on any territory so purchased and offered for sale, shall, either on their own petition or on the order of congress, receive authority from them, with appointments of time and place, for their free males of full age, within the limits of their state, to meet together, for the purpose of establishing a temporary government, to adopt the constitution and laws of any one of the original states; so that such laws, nevertheless, shall be subject to alteration by their ordinary legislature; and to erect, subject to a like

subject of this ordinance, be, and the same are hereby repealed and declared null and void. Done, &c.

Whereas the United States in congress assembled did, on the seventh day of July, in the year of our Lord one

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alteration, counties, townships, or other divisions, for the election of members for their legislature.

That when any such state shall have acquired twenty thousand free inhabitants, on giving due proof thereof to congress, they shall receive from them authority, with appointments of time and place, to call a convention of representatives to establish a permanent constitution and government for themselves. Provided, that both the temporary and permanent governments be established on these principles as their basis:

1. That they shall for ever remain a part of this confederacy of the United States of America.

2. That they shall be subject to the articles of confederation in all those cases in which the original states shall be so subject, and to all the acts and ordinances of the United States in congress assembled, conformable thereto.

3. That they, in no case, shall interfere with the primary disposal of the soil by the United States in congress assembled, nor with the ordinances and regulations which congress may find necessary for securing the title in such soil to the bona fide purchasers.

4. That they shall be subject to pay a part of the federal debts contracted, or to be contracted, to be apportioned on them by congress, according to the same common rule and measure by which apportionments thereof shall be made on the other states:

5. That no tax shall be imposed on lands the property of the United States.

6. That their respective governments shall be republican.

7. That the lands of nonresident proprietors shall, in no case, be taxed higher than those of residents within any new state, before the admission thereof to a vote by its delegates in congress.

That whensoever any of the said states shall have, of free inhabitants, as many as shall then be in any one the least numerous of the thirteen original states, such state shall be admitted by its delegates into the congress of the United States, on an equal footing with the said original states; provided the consent of so many states in congress is first obtained as may, at the time, be competent to such admission. And in order to adapt the said

thousand seven hundred and eighty-six, state certain reasons, showing that a division of the territory which hath been ceded to the said United States, by this commonwealth, into states, in conformity to the terms of cession, should the same be adhered to, would be attended with many inconveniences, and did recommend a revision of the act of cession, so far as to empower congress to make such a division of the said territory into distinct and republican states, not more than five nor less than three in number, as the situation of that country and future circumstances might require; and the said United States in congress assembled have, in an ordinance for the government of the territory northwest of the river Ohio, passed on the thirteenth of July, one thousand seven hundred and eighty-seven, declared the following as one

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articles of confederation to the state of congress when its numbers shall be thus increased, it shall be proposed to the legislatures of the states, originally parties thereto, to require the assent of two thirds of the United States in congress assembled, in all those cases wherein, by the said articles, the assent of nine states is now required, which, being agreed to by them, shall be binding on the new states. Until such admission by their delegates into congress, any of the said states, after the establishment of their temporary government, shall have authority to keep a member in congress, with a right of debating, but not of voting.

That measure, not inconsistent with the principles of the confederation, and necessary for the preservation of peace and good order among the settlers in any of the said new states, until they shall assume a temporary government as aforesaid, may, from time to time, be taken by the United States in congress assembled.

That the preceding articles shall be formed into a charter of compact; shall be duly executed by the president of the United States in congress assembled, under his hand, and the seal of the United States; shall be promulgated; and shall stand as fundamental constitutions between the thirteen original states, and each of the several states now newly described, unalterable from and after the sale of any part of the territory of such state, pursuant to this resolve, but by the joint consent of the United States in congress assembled, and of the particular state within which such alteration is proposed to be made. [*Journals of Congress*]

of the articles of compact between the original states and the people and states in the said territory, viz:

> [Here the 5th article of compact, of the ordinance of congress, of 13th July, 1787, is recited verbatim. See ante, page 480.]

And it is expedient that this commonwealth do assent to the proposed alterations, so as to ratify and confirm the said article of compact between the original states and the people and states in the said territory;

2. Be it, therefore, enacted, by the general assembly, That the aforerecited article of compact, between the original states and the people and states in the territory northwest of Ohio river, be, and the same is hereby ratified and confirmed, any thing to the contrary, in the deed of cession of the said territory by this commonwealth to the United States, notwithstanding.

Act of July 23, 1787

1 Laws of the United States 573 (1815)

Powers to the board of treasury to contract for the sale of western territory

The report of a committee, consisting of Mr. Carrington, Mr. King, Mr. Dane, Mr. Madison, and Mr. Benson, amended to read as follows, viz.

That the board of treasury be authorized and empowered to contract with any person or persons for a grant of a tract of land which shall be bounded by the Ohio, from the mouth of Scioto to the intersection of the western boundary of the seventh range of townships now surveying; thence by the said boundary to the northern boundary of the tenth township from the Ohio; thence by a due west line to Scioto; thence by the Scioto to the beginning, upon the following terms, viz: The tract to be surveyed, and its contents ascertained, by the geographer or some other officer of the United States, who shall plainly mark the said east and west line, and shall render one complete plat to the board of treasury, and another to the purchaser or purchasers. The purchaser or purchasers, within seven years from the completion of this work, to lay off the whole tract, at their own expense, into townships and fractional parts of townships, and to divide the same into lots, according to the land ordinance of the 20th of May, 1785;* complete returns whereof to be made to the treasury board. The lot No. 16, in each township or fractional part of a township, to be given perpetually for the purposes contained in the said ordinance. The lot No. 29, in each township or fractional part of a township, to be given perpetually for the purposes of religion.† The lots Nos. 8, 11, and 26, in each

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* See the ordinance, ante, chapter 32, page 563.

† This grant of No. 29, for religious purposes, is confined to the Ohio company's purchase, and to John Cleves Symmes' patent. *Note of the editor of the Land Laws* & c.

township, or fractional part of a township, to be reserved for the future disposition of congress. Not more than two complete townships to be given perpetually for the purposes of an university, to be laid off by the purchaser or purchasers, as near the centre as may be, so that the same shall be of good land, to be applied to the intended object by the legislature of the state. The price to be not less than one dollar per acre for the contents of the said tract, excepting the reservations and gifts aforesaid, payable in specie, loan office certificates reduced to specie value, or certificates of liquidated debts of the United States, liable to a reduction by an allowance for bad land, and all incidental charges and circumstances whatever; provided, that such allowance shall not exceed, in the whole, one-third of a dollar per acre. And in making payment the principal only of the said certificates shall be admitted,‡ and the board of treasury, for such interest as may be due on the certificates rendered in payment as aforesaid, prior to January 1, 1786, shall issue indents for interest to the possessors, which shall be receivable in payment as other indents for interest of the existing requisitions of congress; and for such interest as may be due on the said certificates between that period and the period of payment, the said board shall issue indents, the payment of which to be provided for in future requisitions, or otherwise. Such of the purchasers as may possess rights for bounties of land to the late army, to be permitted to render the same in discharge of the contract, acre for acre; provided, that the aggregate

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‡ On a letter of the 22d from the board of treasury, stating, that in the sales which they have made of lands in the western territory, a declaration had been made by them, previous to the sale, that the interest on the securities to be received in payment was not to be computed, and requesting to be favored with the sense of congress, whether in payment of purchases made under the ordinance of the 20th May, 1785, interest should be computed on the principal of the securities, and received in payment on the same terms with the principal. [*The resolve at bottom of next page.*]

of such rights shall not exceed one-seventh part of the land to be paid for; and provided also, that there shall be no future claim against the United States on account of the said rights. Not less than 500,000 dollars of the purchase money to be paid down upon closing of the contract, and the remainder upon the completion of the work to be performed by the geographer or other officer on the part of the United States. Good and sufficient security to be given by the purchaser or purchasers for the completion of the contract on his or their part. The grant to be made upon the full payment of the consideration money, and a right of entry and occupancy to be acquired immediately for so much of the tract as shall be agreed upon between the board of treasury and the purchasers.

Ordered, That the above be referred to the board of treasury to take order.

[*Note*. See, in relation to the preceding report and order, the letter from Manh. Cutler and Winthrop Sargent; ante, chap. 31, No. 14, page 491. With respect to that letter, which was dated "New York, July 26, 1787," congress, on the day following, passed the subjoined order:

"Ordered, That the above letter from Manh. Cutler, and Winthrop Sargent, to the board of treasury, containing proposals for the purchase of a tract of land described in the act of congress of the 23d instant, be referred to the board of treasury to take order; provided, that after the date of the second payment therein proposed to be made, the residue shall be paid in six equal and half yearly instalments, until the whole thereof shall be completed, and that the purchasers stipulate to pay interest on the sums due from the completion of the survey to be performed by the geographer. *Journals of congress, July 27, 1787.*]

Act of June 20, 1788

1 Laws of the United States 580 (1815)

Provisions respecting claims and donations in the territories of Indiana, Illinois, and Michigan.

The committee, consisting of Mr. Williamson, Mr. Dane, Mr. Carrington, Mr. Kearney, and Mr. Wingate, to whom was referred a memorial of George Morgan and his associates, respecting a tract of land in the Illinois country, on the Mississippi, having reported thereon, and their report being amended to read as follows: "That there are sundry French settlements on the river Mississippi, within the tract which Mr. Morgan and his associates propose to purchase. Near the mouth of the river Kaskaskies, there is a village which appears to have contained near eighty families from the beginning of the late revolution. There are twelve families in a small village at la Prairie du Rochers, and near fifty families at the Kahokia village. There are also four or five families at fort Chartres and St. Philips, which is five miles farther up the river. The heads of families in those villages appear, each of them, to have had a certain quantity of arable land allotted to them, and a proportionate quantity of meadow and of woodland or pasture. Your committee are of opinion, that from any general sale which may be made of the lands on the Mississippi, there should, at least, be a reserve of so much land as may satisfy all the just claims of the ancient settlers on that river, and that they should be confirmed in the possession of such lands as they may have had at the beginning of the late revolution, which may have been allotted to them according to the laws or usages of the governments under which they have respectively settled. And whereas an additional quantity of land may be necessary for the support of those people whenever the settlement shall increase, and the Indian trade, by which they have chiefly subsisted, shall become less profitable; your committee are of the opinion that such allowance should also be made

to them within the reserved limits. Your committee observe, that in the contract which is already made for the sale of a tract of land in the western country, the purchasers are to be charged with surveying three lots which are reserved for the benefit of the United States. They conceive that future contractors may be relieved from this expense, but they would propose that every agreement hereafter to be made shall be equally binding on the contracting parties; whereupon they submit the following resolves:

That the board of treasury be authorized to contract with any person or persons for a grant of a tract of land, which shall be bounded as follows: beginning on the river Au Vase, in the parallel of latitude of the mouth of Little Wabash river; thence running due north to the parallel of latitude which passes through the mouth of Wood river; thence west to the Mississippi at the mouth of Wood rivers; thence down the river Mississippi to the mouth of the river Au Vase; thence up the said river to the place of beginning, under the exceptions and reservations hereinafter mentioned.

That the purchaser or purchasers shall oblige themselves to lay off the tract at their own expense, into townships or fractional parts of townships, and to divide the same into lots according to the land ordinance of the 20th May, 1785,* complete returns of which are to be made to the board of treasury. The lot No. 16, in each township, or fractional part of a township, to be given perpetually for the purposes contained in the said ordinance; and the lot No. 29, in each township or fractional part of a township, to be given perpetually for the purposes of religion; and that each of the several townships shall be thus laid off before the original purchaser or purchasers shall have disposed of the same, or make any settlement therein. The price to be not less than two-thirds of a dollar per acre for the contents of the said

* See the ordinance, ante, chap. 32, page 563.

tract, except the reservations and gifts herein mentioned, payable in specie, loan office certificates reduced to specie value, or certificates of liquidated debts of the United States; the principal only of the said certificates to be received in payment; and the board of treasury, for such interest as may be due on the certificates rendered in payment as aforesaid, prior to the first day of January, 1787, shall issue indents for interest to the possessors, which shall be receivable in payment as other indents for interest of the existing requisitions of congress; and for such interest as may be due on the said certificates, be-between that period and the time of payment, the board shall issue indents, the payment of which to be provided for hereafter. That part of the purchase money, not less than one hundred and fifty thousand dollars, shall be paid down upon the closing of the contract, and the remainder of the purchase money whenever the Indian claim shall have been extinguished, and the boundary line of the tract run by the geographer of the United States, or his assistant, the contents of the land which is to be sold ascertained, and a pilot of the same returned to the office of the treasury board; on which payment a grant shall be made, and the purchaser or purchasers shall have the right of entry and occupancy.*

That separate tracts shall be reserved for satisfying the claims of the ancient settlers, which shall be included within the following boundary, viz: a straight line to be extended from the mouth of the little river Marie, below the river Kaskaskies, to the old French fort on the east side of the said river Kaskaskies and opposite the Kaskaskie village; thence north three miles; thence west across the Kaskaskies river to the ridge of rocks and high land which extend from the Kaskaskies to the Illinois rivers; then along the west side or foot of the said ridge of rocks and high land, to the parallel that runs two miles north of the church at Kahokia; thence west

* The purchase, thus authorized, was never effected.

to the river Mississippi; thence down the said river to the mouth of the river Marie.

That measures be immediately taken for confirming in their possessions and titles, the French and Canadian inhabitants, and other settlers on those lands, who, on or before the year 1783, had professed themselves citizens of the United States or any of them, and for laying off the several tracts which they rightfully claim within the described limits; and for laying off, for the benefit of the said inhabitants, three additional tracts adjoining the several villages Kaskaskies, la Prairie du Rochers, and Kahokia, in the form of a parallelogram, extending from the river Mississippi eastward, to the ridge of rocks before described, and of such extent as shall contain four hundred acres for each of the families now living at either of the villages of Kaskaskies, la Prairie du Rochers, Kahokia, fort Chartres, or St. Philip's. The additional reserved tract adjoining the village of Kaskaskies shall be for the heads of families in that village; the tract adjoining la Prairie du Rochers for the heads of families in that village; and the tract adjoining Kahokia for the heads of families in that village, as also for those at fort Chartres and St. Philip's. Such additional donations of four hundred acres each to be distributed by lot, and immediate possession given: provided nevertheless, that no person thus obtaining possession of such donation lands shall have power to alienate the same, until he or she, or his or her heirs, shall have resided, at least three years from the time of such distribution, within that district; at the end of which period, every such resident shall obtain a title to the reserved lot; and all lots not thus conveyed to residents, shall revert to the United States.

Thus whenever the French and Canadian inhabitants, and other settlers aforesaid, shall have been confirmed in their possessions and titles, and the amount of the same ascertained, and the three additional parallelograms for

future donations, and a tract of land one mile square on the Mississippi, extending as far above as below fort Chartres, and including the said fort, the buildings and improvements adjoining the same, shall be laid off, the whole remainder of the soil, within the reserved limits above described, shall be considered as appertaining to the general purchase, and shall be conveyed accordingly.

That measures be immediately taken to extinguish the Indian claim, if any such exists, to the land bordering on the Mississippi, from the mouth of the Ohio to a determined station on the Mississippi, that shall be sixty or eighty miles north from the mouth of the Illinois river, and extending from the Mississippi as far eastward as may be.

That the governor of the western territory be instructed to repair to the French settlements on the Mississippi, at and above the Kaskaskies; that he examine the titles and possessions of the settlers as above described, in order to determine what quantity of land they may severally claim, which shall be laid off for them at their own expense; and that he take an account of the several heads of families living within the reserved limits, in order that he may determine the quantity of land that is to be laid off in the several parallelograms, which shall be laid off accordingly by the geographer of the United States or his assistant, at the expense of the United States.

That the geographer of the United States be instructed to take the latitude of the mouth of the river Au Vase, and the mouth of Wood river, and of the northeast and southern angle of the tract; and that, in executing all other large surveys, he take the latitude of three or four of the chief corners."

Act of August 29, 1788

1 Laws of the United States 584 (1815)

On the report of a committee, consisting of Mr. Williamson, Mr. Dane, Mr. Clark, Mr. Tucker, and Mr. Baldwin, to whom was referred the report of a former committee, respecting the inhabitants of Post St. Vincents:

Resolved, That measures be taken for confirming in their possessions and titles, the French and Canadian inhabitants and other settlers at Post St. Vincents, who, on or before the year 1783, had settled there, and had professed themselves citizens of the United States, or any of them, and for laying off to them, at their own expense, the several tracts, which they rightfully claim, and which may have been allotted to them according to the laws and usages of the government under which they have respectively settled.

That four hundred acres of land be reserved and given to every head of a family, of the above description, settled at Post St. Vincents.

That the governor of the western territory cause to be laid out, at the public expense, in the form of a square, adjoining to the present improvements at Post St. Vincents, and in whatever direction the settlers shall prefer, a tract of land sufficient for completing the above donations; which tract shall afterwards be divided by lot among the settlers who are entitled to any part of the same, in such manner as they shall agree.

On a report of the same committee, the following instructions to the governor of the western territory were agreed to:

SIR: You are to proceed without delay, except while you are necessarily detained by the treaty now on hands, to the French settlements on the river Mississippi, in order to give despatch to the several measures which are to be taken according to the acts of the 20th June last,

and the 28th instant, of which a copy is enclosed for your information. You are to inquire whether there be any Indians who claim the lands on the east side of the river Mississippi, above the mouth of the Ohio; and if there be any such Indians, you are immediately to take measures for holding a treaty with them, and extinguishing their claim, at least to so much of the territory as you find described in he aforesaid acts, and in the several acts of October 22d, 1787, relative to lands on the Mississippi. If you find it cheapest and best to extinguish the claim of those Indians by agreeing to furnish them annually with a certain allowance in corn, or other provisions, for a term not exceeding ten years, you will contract accordingly.

When you have examined the titles and possessions of the settlers on the Mississippi, in which they are to be confirmed, and given directions for laying out the several squares, which the settlers may divide, as they shall think best among themselves, by lot, you are to report the whole of your proceedings to congress.

After you shall have despatched the several matters committed to your care on the Mississippi, you will take Post St. Vincents on your return, where you are to pursue the measures directed to be taken by the act of this day, and report your proceedings accordingly.

Committee Report to Congress September 1788

34 Journal of the Continental Congress 540-542 *
(Library of Congress ed. 1933)

[Report of committee on memorial of B. Tardiveau [3]]

The Com. consisting of Mr. [Abraham] Clark Mr. [Hugh] Williamson and Mr. [James] Madison to whom were referred the memorial of Mr. Tardiveau Agent of the French and American Inhabitants of the Illinois and Post St. Vincents, report, that in and by the Ordinance [1] for the Government of the Western territory passed the 13th day of July 1787, it is ordained that, "there shall be neither Slavery nor involuntary Servitude in the said territory otherwise than in the punishment of Crimes whereof the party shall have been duly convicted. And Whereas since the passing of said Ordinance it appears there were at that time Negroes under Servitude to the inhabitants then residing at Kaskaskies Illinois Post St. Vincents and other of the Antient French Settlements whose Right to the property they possessed were guaranteed by Congress in their Act [2] Accepting the Cession [3] of Claim to Western territory made by the State of Virginia; which Right of property it was not the intention of Congress to violate by said Ordinance but merely to restrain the

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* Words struck through in original document have been reprinted in italics.

[3] *Papers of the Continental Congress*, No. 19, VI, pp. 9-10 in the writing of Mr. Abraham Clark. Read September 1788. As there is no indication of the day of the reading, this report is printed on the first day on which business was transacted after the appointment of the committee. See September 17, 1788.

[1] *Journals*, vol. XXXIII, p. 343.

[2] *Journals*, vol. XXVI, p. 116.

[3] Original cession, engrossed on parchment, is in *Papers of the Continental Congress, Cessions of Western Lands.*

Settlers in future from carrying persons under Servitude into the Western territory, for remedy whereof,

Resolved, That the before mentioned Ordinance for the government of the Western territory, shall not be construed to deprive the Inhabitants of Kaskaskies Illinois Post St. Vincents and the other Villages formerly settled by the French and Canadians, of their Right and property in Negro or other Slaves which they were possessed of at the time of passing the said Ordinance, or in any manner to Manumit or Set free any such negroes or other persons under Servitude within any part of Sd. Western territory; any thing in the said Ordinance to the contrary notwithstanding.

And Whereas Congress by their Acts of the 20th of June and 29th of August last, took measures for confirming in their possessions and Titles all the French and Canadian Inhabitants and others, Settlers at or near the Rivers Mississippi Illinois and Wabash, who on or before the year 1783, had professed themselves Citizens of the United States or any of them, and for laying off the several tracts which they rightfully claim within certain limits. And also in and by said Acts directed the laying of certain tracts of Land of such extent as to contain four hundred acres as donations to each of the heads of families in the districts therein mentioned to be divided among them by lot, but omitted making any grants of land for *Supporting Religion* and for *Schools of education* as had been done in the Sales of Land in the western territory; for Supplying which Omission,

Resolved that before the Tracts of Land directed by the above mentioned Acts as donations to the heads of families, shall be laid of, there shall be laid out two Tracts of Land of Acres each Adjoining to each Village not the property of any of the Inhabitants of such Village; one of which said tracts adjoining each Village shall be and remain forever to the sole and only use of

Supporting the *ministry of Religion* in such Village, and the other of said tracts to remain in like manner for supporting *Schools of education* in the Village it adjoins, any thing in the Acts of Congress of the 20th of June or 29th of August last, to the contrary notwithstanding. (Emphasis added.)

Act of September 3, 1788

1 Laws of the United States 579 (1815)

Donation is the Society of the United Brethren.

On a report of a committee, consisting of Mr. Clark, Mr. Williamson, and Mr. Madison, to whom was referred a memorial of John Etwein, of Bethlehem, president of the Brethren's Society for propagating the Gospel among the Heathen:

Whereas the United States in congress assembled, by their ordinance of the 20th May, 1785, among other things, ordained that the towns of Gnadenhutten, Schoenbrun, and Salem, with lands adjoining to the said towns, be reserved for the sole use of the christian Indians, who were formerly settled there, or the remains of that society; and by an act of the 27th July, 1787, directed the board of treasury to except and reserve out of any contract they might make pursuant to an order of the 23d of the same month, a quantity of land around and adjoining to each of the beforementioned towns, amounting in the whole to ten thousand acres, and ordered the property of the said towns and reserved lands to be vested in the Moravian Brethren at Bethlehem, in Pennsylvania, or the society of the said brethren for civilizing the Indians, and promoting christianity (as as they are called, The Society of the United Brethren for propagating the Gospel among the Heathen) in trust and for the uses expressed in the said ordinance, including others, as mentioned in the said act of 27th July, 1787; and whereas it has been agreed that the plot of each of the towns should be estimated at 666 2-3 acres, so that each town and the reserved land adjoining shall make a tract of four thousand acres; and whereas the remnant of the said christian Indians are desirous of returning to their towns as speedily as possible, and the United Brethren, to facilitate this without loss of time, have offered to advance the ex-

penses of surveying the three tracts, on condition they be repaid, either in money or land:

Ordered, That the geographer of the United States survey, or cause to be surveyed, as speedily as possible, without interfering with the business he is sent to execute, the three tracts of Gnadnhutten, Schoenbrun, and Salem, on the Muskingum, including the reserved land adjoining each of the said towns, and return plots thereof to the board of treasury, that deeds may be issued for the same as is mentioned above; and that he also survey or cause to be surveyed, the intermediate spaces, if any there be, between the said three tracts, and return plots thereof, with an account of the expense, to the board of treasury; and that the said board, provided it can be done without infringing any contract they may have already made, convey the same to the said *United Brethren, or the Society of the said Brethren for propagating the Gospel among the Heathen*, upon their paying for the said intermediate space or spaces when the said survey shall be returned by the geographer, at the rate at which such lands are granted to others, and also the expenses attending the surveying and plotting the said spaces, deducting the sum advanced for surveying the three tracts; provided, that in case any of the abovementioned lands shall fall within the supposed bounds of the million of acres reserved for the late army, that the said bounds shall be understood to extend so far to the westward as to include the million of acres exclusive of the abovementioned lands.* (Emphasis added.)

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* See, in fulfilment of the donation made by this ordinance, the act of 1st June 1796; sec. 5, chap. 340, vol. 2.

Act of August 7, 1789

Stat. at Large 50 c. 7

CHAP. VIII.—*An Act to provide for the Government of the Territory Northwest of the river Ohio.*

Whereas in order that the ordinance of the United States in Congress assembled, for the government of the territory north-west of the river Ohio may continue to have full effect, it is requisite that certain provisions should be made, so as to adapt the same to the present Constitution of the United States.[a]

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[a] *An Ordinance for the Government of the Territory of the United States north-west of the river Ohio.*

Be it ordained by the United States in Congress assembled, That the said territory, for the purposes of temporary government, be one district; subject, however, to be divided into two districts, as future circumstances may, in the opinion of Congress, make it expedient.

Be it ordained by the authority aforesaid, That the estates both of resident and non-resident proprietors in the said territory, dying intestate, shall descend to, and be distributed among their children, and the descendants of a deceased child in equal parts; the descendants of a deceased child or grandchild, to take the share of their deceased parent in equal parts among them: And where there shall be no children or descendants, then in equal parts to the next of kin, in equal degree; and among collaterals, the children of a deceased brother or sister of the intestate, shall have in equal parts among them their deceased parents' share; and there shall in no case be a distinction between kindred of the whole and half blood; saving in all cases to the widow of the intestate, her third part of the real estate for life, and one third part of the personal estate; and this law relative to descents and dower, shall remain in full force until altered by the legislature of the district. —And until the governor and judges shall adopt laws as hereinafter mentioned, estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by him or her, in whom the estate may be (being of full age) and attested by three witnesses;—and real estates may be conveyed by lease and release, or bargain and sale, signed, sealed and delivered by the person, being of full age, in whom the estate may be, and attested by two witnesses, provided such wills be duly proved, and such con-

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in all cases in which the said ordinance, any information is to be given, or communication

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veyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts and registers shall be appointed for that purpose; and personal property may be transferred by delivery; saving, however, to the French and Canadian inhabitants, and other settlers of the Kaskaskies, St. Vincent's, and the neighbouring villages, who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them, relative to the descent and conveyance of property.

Be it ordained by the authority aforesaid, That there shall be appointed from time to time, by Congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by Congress: he shall reside in the district, and have a freehold estate therein, in one thousand acres of land, while in the exercise of his office.

There shall be appointed from time to time by Congress, a secretary, whose commission shall continue in force for four years, unless sooner revoked; he shall reside in the district, and have a freehold estate therein, in five hundred acres of land, while in the exercise of his office: it shall be his duty to keep and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceedings of the governor in his executive department; and transmit authentic copies of such acts and proceedings, every six months, to the secretary of Congress: There shall also be appointed a court to consist of three judges, any two of whom to form a court, who shall have a common law jurisdiction, and reside in the district, and have each therein a freehold estate in five hundred acres of land, while in the exercise of their offices; and their commissions shall continue in force during good behaviour.

The governor and judges, or a majority of them, shall adopt and publish in the district, such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district, and report them to Congress, from time to time; which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by Congress; but afterwards the legislature shall have authority to alter them as they shall think fit.

The governor for the time being, shall be commander-in-chief of the militia, appoint and commission all officers in the same,

made by the governor of the said territory to the United States in Congress assembled, or to any of their officers, it shall be the duty of the said, governor to give such information and to make such communication to the

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below the rank of general officers; all general officers shall be appointed and commissioned by Congress.

Previous to the organization of the general assembly, the governor shall appoint such magistrate and other civil officers, in each county or township, as he shall find necessary for the preservation of the peace and good order in the same: After the general assembly shall be organized, the powers and duties of magistrates and other civil officers shall be regulated and defined by the said assembly; but all magistrates and other civil officers shall be regulated and defined by the said assembly; but all magistrates and other civil officers, not herein otherwise directed, shall during the continuance of this temporary government, be appointed by the governor.

For the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof—and he shall proceed from time to time, as circumstances may require, to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature.

So soon as there shall be five thousand free male inhabitants, of full age, in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect representatives from their counties or townships, to represent them in the general assembly; provided that for every five hundred free male inhabitants, there shall be one representative, and so on progressively with the number of free male inhabitants shall the right of representation increase, until the number of representatives shall amount to twenty-five; after which the number and proportion of representatives shall be regulated by the legislature; provided that no person be eligible or qualified to act as a representative, unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years; and in either case, shall likewise hold in his own right, in fee simple, two hundred acres of land within the same: provided also, that a freehold in fifty acres of land in the district, having been a citizen of one of the States, and being resident in the district, or the like freehold

President of the United States, and the President shall nominate, and by and with the advice and consent of the

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and two years residence in the district shall be necessary to qualify a man as an elector of a representative.

The representatives thus elected, shall serve for the term of two years; and in case of the death of a representative, or removal from office, the governor shall issue a writ to the county or township, for which he was a member, to elect another in his stead, to serve for the residue of the term.

The general assembly, or legislature, shall consist of the governor, legislative council, and a house of representatives. The legislative council shall consist of five members, to continue in office five years, unless soonor removed by Congress; and three of whom to be a quorum: and the members of the council shall be nominated and appointed in the following manner, to wit: As soon as representatives shall be elected, the governor shall appoint a time and place for them to meet together, and, when met, they shall nominate ten persons, residents in the district, and each possessed of a freehold in five hundred acres of land, and return their names to Congress; five of whom Congress shall appoint and commission to serve as aforesaid; and whenever a vacancy shall happen in the council, by death or removal from office, the house of representatives shall nominate two persons, qualified as aforesaid, for each vacancy and return their names to Congress; one of whom Congress shall appoint and commission for the residue of the term. And every five years, four months at least before the expiration of the time of service of the members of council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to Congress; five of whom Congress shall appoint and commission to serve as members of the council five years, unless sooner removed. And the governor, legislative council, and house of representatives, shall have authority to make laws in all cases, for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared. And all bills having passed by a majority in the house, and by a majority in the council, shall be referred to the governor for his assent; but no bill or legislative act whatever, shall be of any force without his assent. The governor shall have power to convene, prorogue and dissolve the general assembly, when in his opinion it shall be expedient.

The governor, judges, legislative council, secretary, and such other officers as Congress shall appoint in the district, shall take

Senate, shall appoint all officers which by the said ordinance were to have been appointed by the United States in Congress assembled, and all officers so appointed shall be commissioned by him; and in all cases where the

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an oath or affirmation of fidelity, and of office; the governor before the president of Congress, and all other officers before the governor. As soon as a legislature shall be formed in the district, the council and house assembled, in one room, shall have authority, by joint ballot, to elect a delegate to Congress, who hall have a seat in Congress, with a right of debating, but not of voting during this temporary government.

And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory: to provide also for the establishment of States, and permanent government therein, and for their admission to a share in the federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest:

It is hereby ordained and declared, by the authority aforesaid, That the following articles shall be considered as articles of compact between the original States, and the people and States in the said territory, and forever remain unalterable, unless by common consent, to wit:

ART. I. No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments, in the said territory.

ART. II. The inhabitants of the said territory, shall always be entitled to the benefits of the writ of habeas corpus, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere

United States in Congress assembled, might, by the said ordinance, revoke any commission or remove from any office, the President is hereby declared to have the same powers of revocation and removal.

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with, or affect private contracts or engagements, bona fide, and without fraud previously formed.

ART. III. Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and frieidship with them.

ART. IV. The said territory, and the States which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the articles of confederation, and to such alterations therein, as shall be constitutionally made; and to all the acts and ordinances of the United States in Congress assembled, conformable thereto. The inhabitants and settlers in the said territory, shall be subject to pay a part of the federal debts, contracted or to be contracted, and a proportional part of the expenses of government, to be apportioned on them by Congress, according to the same common rule and measure, by which apportionments thereof shall be made on the other States, and the taxes for paying their proportion, shall be laid and levied by the authority and direction of the legislatures of the district or districts or new States, as in the original States, within the time agreed upon by the United States in Congress assembled. The legislatures of those districts or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers. No tax shall be imposed on land the property of the United States; and in no case shall non-resident proprietors be taxed higher than residents. The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those

SEC. 2. *And it be further enacted*, That in case of the death, removal, resignation, or necessary absence of the governor of the said territory, the secretary thereof shall be, and he is hereby authorized and required to execute

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of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.

ART. V. There shall be formed in the said territory, not less than three, nor more than five States; and the boundaries of the States, as soon as Virginia shall alter her act of cession, and consent to the same, shall become fixed and established as follows, to wit: The western State in the said territory, shall be bounded by the Mississippi, the Ohio and Wabash rivers; a direct line drawn from the Wabash and Post Vincents due north to the territorial line between the United States and Canada; and by the said territorial line to the Lake of the Woods and Mississippi. The middle State shall be bounded by the said direct line, the Wabash from Post Vincents to the Ohio; by the Ohio, by a direct line drawn due north from the mouth of the Great Miami, to the said territorial line, and by the said territorial line. The eastern State shall be bounded by the last mentioned direct line, the Ohio, Pennsylvania, and the said territorial line: Provided however, and it is further understood and declared, that the boundaries of these three States shall be subject so far to be altered, that if Congress shall hereafter find it expedient, they shall have authority to form one or two States in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of lake Michigan. And whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States, in all respects whatever; and shall be at liberty to form a permanent constitution and State government: Provided the constitution and government so to be formed, shall be republican, and in conformity to the principles contained in these articles; and so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the State than sixty thousand.

ART. VI. There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes, whereof the party shall have been duly convicted: Provided always, that any person escaping into the same, from whom labour or service is lawfully claimed in any one of the original States, such fugi-

all powers, and perform all the duties of the governor, during the vacancy occasioned by the removal, resignation or necessary absence of the said governor.[a]

APPROVED, August 7, 1789.

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tive may be lawfully reclaimed, and conveyed to the person claiming his or her labour or service as aforesaid.

Done by the United States in Congress assembled, the thirteenth day of July, in the year of our Lord one thousand seven hundred and eighty-seven, and of their sovereignty and independence the twelfth.

WILLIAM GRAYSON, *Chairman.*

CHARLES THOMSON, *Secretary.*

(*a*) The States of Ohio, Indiana, Illinois, and Michigan, were, after the enactment of this law, formed out of part of "The Territory of the United States, northwest of the river Ohio," and became members of the federal Union.

OHIO was established as a State April 30, 1802. INDIANA was admitted into the Union December 11, 1816. ILLINOIS was admitted into the Union December 3, 1818. MICHIGAN was admitted into the Union January 26, 1837.

Act of May 5, 1792

1 Stat. at Large 266 c. 30

CHAP. XXX.—*An Act authorizing the grant and conveyance of certain Lands to John Cleves Symmes, and his Associates.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President of the United States be and he hereby is authorized and empowered to issue letters patent in the name and under the seal of the United States, thereby granting and conveying to John Cleves Symmes and his associates, and to their heirs and assigns, in fee simple, such number of acres of land as the payments already made by the said John Cleves Symmes, his agents or associates, under their contract of the fifteenth day of October one thousand seven hundred and eighty-eight, will pay for, estimating the lands at two thirds of a dollar per acre, and making the reservations specified in the said contract.

SEC. 2. *And be it further enacted*, That the President be and he hereby is further authorized and empowered, by letters patent as aforesaid, to grant and convey to the said John Cleves Symmes and his associates and to their heirs and assigns in fee simple one other tract of one hundred and six thousand eight hundred and fifty-seven acres with the reservations as aforesaid: *Provided*, That the said John Cleves Symmes, or his agents or associates, or any of them, shall deliver to the Secretary of the Treasury, within six months, warrants which issued for army bounty rights sufficient for that purpose, according to the provision of the resolves of Congress of the twenty-third of July, and second of October, one thousand seven hundred and eighty-seven; but in case so many warrants should not be delivered, then the letters patent last aforesaid be given for such number of acres, as shall be in proportion to the warrants so delivered.

SEC. 3. *And be it further enacted*, That the President be and he is hereby authorized and empowered, by letters patent as aforesaid, to grant and convey unto the said John Cleves Symmes and his associates, their heirs and assigns, in trust for the purpose of establishing an academy and other public schools and seminaries of learning, one complete township, conformably to an order of Congress of the second of October, one thousand seven hundred and eighty-seven, made in consequence of the application of the said John Cleves Symmes, for the purchase of the tract aforesaid.

SEC. 4. *And be it further enacted*, That the several quantities of land, to be granted and conveyed as aforesaid, shall be included and located within such limits and lines of boundary, as the President may judge expedient, agreeably to an act passed the twelfth day of April one thousand seven hundred and ninety-two, "for ascertaining the bounds of a tract of land purchased by John Cleves Symmes."

APPROVED, May 15th, 1792.

Act of May 6, 1792

Laws of the United States—Relating to the Public Lands 373 (1828)

An act authorizing the grant and conveyance of certain lands to John Cleves Symmes and his associates.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States be, and he hereby is, authorized and empowered to issue letters patent, in the name and under the seal of the United States, thereby granting and conveying to John Cleves Symmes and his associates, and to their heirs and assigns, in fee simple, such number of acres of land as the payments already made by the said John Cleves Symmes, his agents, or associates, under their contract of the fifteenth day of October, one thousand seven hundred and eighty-eight, will pay for, estimating the lands at two-thirds of a dollar per acre, and making the reservations specified in the said contract.

SEC. 2. *And be it further enacted*, That the President be, and he hereby is, further authorized and empowered, by letters patent as aforesaid, to grant and convey to the said John Cleves Symmes and his associates, and to their heirs and assigns, in fee simple, one other tract of one hundred and six thousand eight hundred and fifty-seven acres, with the reservations as aforesaid: *Provided*, That the said John Cleves Symmes, or his agents or associates, or any of them, shall deliver to the Secretary of the Treasury, within six months, warrants which issued for army bounty rights (‡), sufficient for that purpose, according to the provision of the resolves of Congress of the twenty-third of July, § and second of October, one thousand seven hundred and eighty-seven; but in case so many warrants should not be delivered, then the letters patent, last aforesaid, to be given for such number of acres as shall be in proportion to the warrants so delivered.

SEC. 3. *And be it further enacted*, That the President be, and he is hereby authorized and empowered, by letters patent as aforesaid, to grant and convey unto the said John Cleves Symmes, and his associates, their heirs and assigns, in trust, for the purpose of establishing an academy, and other public schools and seminaries of learning, one complete township, conformably to an order of Congress of the second of October, one thousand seven hundred and eighty-seven, made in consequence of the application of the said John Cleves Symmes, for the purchase of the tract aforesaid.*

SEC. 4. *And be it further enacted*, That the several quantities of land, to be granted and conveyed as aforesaid, shall be included and located within such limits and lines of boundary as the President may judge expedient, agreeably to an act passed the twelfth day of April, one thousand seven hundred and ninety-two, "for ascertaining the bounds of a tract of land purchased by John Cleves Symmes."†(‡)

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†‡ The patent granted by virtue of this act contains 311,682 acres, of which 248,540 are the property of the grantees, and the residue consists of the various reservations and grants for public purposes specified in the act.

Act of June 1, 1796

1 Stat. at Large 490 c. 56

CHAP. XLVI.—*An Act regulating the grants of land appropriated for Military services, and for the Society of the United Brethren, for propagating the Gospel among the Heathen.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Surveyor General be, and he is hereby required, to cause to be surveyed, the tract of land beginning at the northwest corner of the seven ranges of townships, and running thence fifty miles due south, along the western boundary of the said ranges; thence due west to the main branch of the Scioto river; thence up the main branch of the said river, to the place where the Indian boundary line crosses the same; thence along the said boundary line, to the Tuscaroras branch of the Muskingum river, at the crossing place above Fort Lawrence; thence up the said river, to the point, where a line, run due west from the place of beginning, will intersect the said river; thence along the line so run to the place of beginning; and shall cause the said tracts to be divided into townships of five miles square, by running, marking and numbering the exterior lines of the said townships, and marking corners in the said lines, at the distance of two and one half miles from each other, in the manner directed by the act, intituled "An act providing for the sales of the lands of the United States, in the territory northwest of the river Ohio, and above the mouth of Kentucky river;" and that the lands above described, except the salt springs therein, and the same quantities of land adjacent thereto, as are directed to be reserved with the salt springs, in the said recited act, and such tracts within the boundaries of the same, as have been heretofore appropriated by Congress, be, and they are hereby, set apart and reserved for the purposes herein after mentioned.

SEC. 2. *And be it further enacted*, That the said land shall be granted only in tracts containing a quarter of the township to which they belong, lying in the corners thereof; and that the Secretary of the Treasury shall, for the space of nine months, after public notice in the several states and territories, register warrants for military services, to the amount of any one or more tracts, for any person or persons holding the same; and shall immediately after the expiration of the said time, proceed to determine, by lot, to be drawn in the presence of the secretaries of state and of war, the priority of location of said registered warrants; and the person or persons holding the same, shall severally make their locations, after the lots shall be proclaimed, on a day to be previously fixed in the before mentioned notice; in failure of which, they shall be postponed in locating such warrants, to all other persons holding registered warrants: And the patents for all lands located under the authority of this act, shall be granted in the manner directed by the before mentioned act, shall be granted in the manner directed by the before mentioned act, without requiring any fee therefor.

SEC. 3. *And be it further enacted*, That after the time limited for making the locations, as aforesaid, any person or persons holding warrants, of the before mentioned description, sufficient to cover any one or more tracts, as aforesaid, shall be at liberty to make their locations, on any tract or tracts not before located.

SEC. 4. *And be it further enacted*, That all the lands set apart by the first section of this act, which shall remain unlocated on the first day of January, in the year one thousand eight hundred, shall be released from the said reservation, and shall be at the free disposition of the United States, in the manner as any other vacant territory of the United States. And all warrants or claims for lands on account of military services, which shall not, before the day aforesaid, be registered and located, shall be forever barred.

SEC. 5. *And be it further enacted*, That the said surveyor general be, and he is hereby, required to cause to be surveyed three several tracts of land, containing *four thousand acres each*, at Shoenbrun, Gnadenhutten, and Salem; being the tracts formerly set apart, by an ordinance of Congress of the third of September, one thousand seven hundred and eighty-eight, for the *society of United Brethren for propagating the gospel among the heathen*; and to issue a patent or patents for the said three tracts to the said society, in trust, for the uses and purposes in the said ordinance set forth. (Emphasis added.)

SEC. 6. *And be it further enacted*, That all navigable streams or rivers within the territory to be disposed of, by virtue of this act, shall be deemed to be and remain public highways. And that, in all cases, where the opposite banks of any stream not navigable shall belong to different persons, the stream and the bed thereof shall be common to both.

APPROVED, June 1, 1796.

Consent of the President to the Modification of John C. Symmes's Petition, September 30, 1794

Laws of the United States—Relating to the Public Lands 376 (1828)

Consent of the President to the above petition.

To all persons to whom these Presents shall come, George Washington, President of the United States of America, sends Greeting:

Whereas, in pursuance of certain resolutions of the United States, in Congress assembled, bearing date respectively the twenty-third and twenty-seventh days of July, and the twenty-third day of October, one thousand seven hundred and eighty-seven, or some of them, a contract was duly made and executed between Samuel Osgood, Walter Livingston, and Arthur Lee, esquires, commissioners of the Board of the Treasury of the United States, of the first part, Jonathan Dayton and Daniel Marsh, esquires, of the second part, and John Cleves Symmes, esquire, of the third part, for the purchase and grant of a certain tract of land in the Western country, adjoining the river Ohio, beginning on the bank of the same river at a spot exactly twenty miles distant along the several courses of the same from the place where the Great Miami empties itself into the said river Ohio; from thence, extending down the said river Ohio, along the several courses thereof, to the Great Miami river; thence, up the said river Miami, along the several courses thereof, to a place whence a line drawn due East will intersect a line drawn from the place of beginning aforesaid, parallel with the general course of the Great Miami river, so as to include one million of acres within those lines and the said rivers; and from that place, up the said Great Miami river, extending along such lines, to the place of beginning, containing as aforesaid one million of acres, to be granted to the said John Cleves Symmes and his associates, their heirs and assigns, upon certain terms

and conditions, as in and by the said contract bearing date the fifteenth day of May, one thousand seven hundred and eighty-eight, reference being thereunto had will fully appear. And whereas by an act of Congress of the United States bearing date the twelfth day of April, one thousand seven hundred and ninety-two, entitled an act for ascertaining the bounds of a tract of land purchased by John Cleves Symmes. The President of the United States was authorized, at the request of the said John Cleves Symmes, to alter the said contract made between the said late Board of the Treasury, and the said John Cleves Symmes, in such manner that the said tract may extend from the mouth of the Great Miami to the mouth of the Little Miami, and be bounded by the river Ohio on the South, by the Great Miami on the West, by the Little Miami on the East, and by a parallel of latitude on the North, extending from the Great Miami to the Little Miami, so as to comprehend the proposed quantity of one million of acres: *Provided*, That the Northern limits of the said tract shall not interfere with the boundary line established by the treaty of Fort Harmar between the United States and the Indian nations: *And provided also*, That the President reserve to the United States such lands at or near fort Washington, as he may think necessary for the accommodation of a garrison at that fort, as in and by the said act, reference thereunto had, will more fully appear. And whereas the said John Cleves Symmes, by a certain instrument of writing under his hand and seal, bearing date the day next before the date of these presents, did request the President of the United States that the contract so as aforesaid made by the said Commissioners of the late Board of Treasury on behalf of the United States, of the one part, and him, the said John Cleves Symmes, by his said agents Jonathan Dayton and Daniel Marsh, on behalf of himself and his associates, of the other part, might be altered, so as to include only the last mentioned tract, butted, bounded, and described, as in the said act of the Congress aforesaid

is set forth, subject to the same conditions and with the same limitations and reservations as in the said contract and act of Congress are expressed, and also subject to the reservation of the quantity of fifteen acres, being for the accommodation of Fort Washington and the garrison thereof, and including the said fort in such part of the said tract as the President of the United States should find convenient and suitable for military purposes and should cause to be located therefor; and further subject to the reservation of one mile square within four miles of the mouth of the Great Miami, to be located by such person as the President of the United States shall appoint for that purpose: *Provided*, That a law be passed within the space of two years from the date thereof to authorize the last mentioned reservation and location, and that the President of the United States should appoint a person to make such location within the space of one year after such law shall be passed: *And provided, also*, That the same law shall authorize the President to make, and the President shall make and execute to the said John Cleves Symmes and his associates, and to his and their heirs and assigns, within the said last mentioned term of one year, a grant and release of the aforesaid fifteen acres reserved for the use and accommodation of Fort Washington and the garrison thereof, and thereby did remise, release, and quit claim, unto the said United States, all his right, title, interest, claim, and demand whatever, in and to so much of the lands contained and included within the bounds and limits described in the said contract, as is not contained, or meant and intended to be contained and included within the bounds and limits secondly above mentioned, as in and by the said recited instrument, relation being thereunto had will appear. Now, know ye, in pursuance of the act of Congress aforesaid, and the said request of the said John Cleves Symmes, I have assented and by these presents do testify and declare my assent to an alteration of the said contract in manner following; that is to say: that the tract of land to be granted to the

said John Cleves Symmes, upon the same terms and conditions as in and by the said contract, made on the fifteenth day of October, one thousand seven hundred and eighty-eight, between Arthur Lee, Walter Livingston, and Samuel Osgood, Commissioners of the Board of Treasury, the said Daniel Marsh, and Jonathan Dayton, and the said John Cleves Symmes, were stipulated and agreed upon, shall extend from the mouth of the Great Miami to the mouth of the Little Miami, and shall be bounded by the river Ohio on the South, by the Great Miami on the West, by the Little Miami on the East, by a parallel of latitude on the North, extending from the Great Miami to the Little Miami, so as to comprehend one million of acres: *Provided*, That the Northern limits of the said tract shall not interfere with the boundary line established by the treaty of Fort Harmar between the United States and the Indian nations; and reserving out of the said tract the quantity of fifteen acres, being for the accommodation of Fort Washington and the garrison thereof, and including the said Fort, in such part of the said tract as the said President shall find convenient and suitable for military purposes, and shall cause to be located. Therefore, also reserving, out of each township in the said tract, the following lots, to wit: lot No. 16 for the purpose mentioned in the Land Ordinance, of the 20th May, 1785, lot No. 29 for the purposes of religion, and lots No. 8, No. 11, and No. 26, to be subject to the disposition of the Congress of the United States; and also reserving to the said United States, out of the said tract, the quantity of one square mile, within four miles of the mouth of the Great Miami, to be located by such person as the President of the United States shall appoint for that purpose: *Provided*, That a law be passed within the space of two years from the date of these presents, to authorize the last mentioned reservation and location; and that the President shall appoint a person to make such location, within the space of one year after such law shall be passed: *And provided, also*, That the same law shall

authorize the President to make, and the President shall make, and execute to the said John Cleves Symmes, and his associates, his and their heirs and assigns, a grant and release of the aforesaid fifteen acres reserved for the use and accommodation of Fort Washington and the garrison thereof.

In testimony whereof, I have caused these letters to be made patent, and the Seal of the United States to be hereunto affixed.

Given under my hand, at the City of Philadelphia, the thirtieth day of September, in the year of our Lord one thousand seven hundred and ninety four, and of the Independence of the United States of America, the nineteenth.

GEO. WASHINGTON.

[Copied from the Records in the General Land Office.]

Consent of the President to John C. Symmes's Patent, September 30, 1794

1 Laws of the United States 497 (1815)

J. C. SYMMES'S PATENT.—In the name of the United States of America, to all to whom these presents shall come:

Know ye, that whereas it appears to me, George Washington, president of the said United States, that John Cleves Symmes, in behalf of himself and his associates, in pursuance of a contract, made and executed on the fifteenth day of October, one thousand seven hundred and eighty-eight, between Arthur Lee, Walter Livingston, and Samuel Osgood, commissioners of the board of treasury, and Jonathan Dayton and Daniel Marsh, and the said John Cleves Symmes, hath paid into the treasury of the United States the sum of one hundred and sixty-five thousand six hundred and ninety-three dollars and forty-two cents, in certificates and warrants for military rights to lands: whereby, and by virtue of the act of the congress of the United States, entitled "An act authorizing the grant and conveyance of certain lands to John Cleves Symmes, and his associates," passed the fifth day of May, one thousand seven hundred and ninety-two, the said John Cleves Symmes and his associates are become entitled to receive from the United States letters patent, granting and conveying to him and them, two hundred and forty-eight thousand five hundred and forty acres of land: and whereas, in and by the said contract, it was stipulated and agreed, by and between the said Arthur Lee, Walter Livingston, and Samuel Osgood, commissioners on the part of the United States, and the said Jonathan Dayton and Daniel Marsh, and the said John C. Symmes, that out of each township, which should fall within the grant to be made to the said John Cleves Symmes and his associates, a reservation should be made to the United States, of the four lots, marked 8, 11, 26, and 29, for such

purposes as shall, by the congress of the United States, be directed; and lot No. 16, for the maintenance of public schools, the same being pursuant to the regulations contained in an ordinance of the United States in congress assembled, bearing date the twentieth day of May, one thousand seven hundred and eighty-five: * and whereas, in and by the aforesaid act of congress of the United States, passed the fifth day of May, one thousand seven hundred and ninety-two, the president of the United States was authorized and empowered by letters patent, to grant and convey unto the said John Cleves Symmes, and his associates, their heirs, and assigns, in trust, for the purpose of establishing an academy, and other public schools and seminaries of learning, one complete township, conformably to an order of congress, made the second day of October, one thousand seven hundred and eighty-seven: and whereas, it appears expedient to reserve to the United States, out of the tract of land hereby intended to be granted, the quantity of fifteen acres of land, for the accommodation of fort Washington and the garrison thereof, including the said fort; and also, a quantity of land, equal, to one mile square, at or near the mouth of the Great Miami river, to be located as hereafter mentioned.

Now these presents testify, that I, the said George Washington, president of the United States, in the name and by the authority of the said United States, in consideration of the premises, in pursuance of the said act of the congress of the United States, passed the fifth day of May, 1792, and by virtue of the authority thereby in me reposed, have granted and confirmed, and by these presents do grant and confirm, unto the said John Cleves Symmes and his associates, and to his and their heirs and assigns, all that tract of land, beginning at the mouth of the Great Miami river, and extending from thence along the river Ohio, to the mouth of the Little Miami river, bounded on the south by the said river Ohio, on the west by the said Great Miami river, on the east by the said

little river Miami, and on the north by a parallel of latitude, to be run from the said Great Miami river to the said Little Miami river, so as to comprehend the quantity of three hundred and eleven thousand six hundred and eighty-two acres of land, with the appertenances, reserving to the United States, out of the said tract, the quantity of fifteen acres of land, for the accommodation of fort Washington and the garrison thereof, including the space of ground occupied by the said fort, to be located in such part of the said tract, and by such person, as the president of the United States shall direct; and also, reserving out of the said tract, a quantity of land equal to one mile square, at or near the mouth of the said Great Miami river, to be located by such person as the president of the United States shall appoint for the purpose: provided, that a law be passed by the congress of the United States to authorize the same, within the space of two years from and after the date of these presents; and that the president of the said United States shall appoint a person to make such location, within one year after such law shall be passed, and not otherwise: and provided also, that the same law shall authorize the president of the United States to make, and the president of the United States shall make, and execute to the said John Cleves Symmes and his associates, their heirs, and assigns, a grant and release of the aforesaid fifteen acres, reserved for the use and accommodation of fort Washington and the garrison thereof; and also reserving to the said United States, out of each township, contained in the said tract, the following lots, viz: lot No. 16, for the purposes mentioned and specified in the ordinance of the United States in congress assembled, passed on the twentieth day of May, one thousand seven hundred and eighty-five; lot No. 29, for the purposes of religion; and lots No. 11, No. 8, and No. 26, for such purposes as the congress of the United States shall hereafter direct: to have and to hold the said tract of land, bounded and described as aforesaid, with the appertenances, to the said John Cleves

Symmes and his associates, his and their heirs and assigns, to his and their proper use and behoof forever, according to their respective rights and interest therein; upon this condition, however, and not otherwise, that the said John Cleves Symmes and his associates, his and their heirs and assigns, shall and do cause the said parallel of latitude, forming the northern boundary of the tract herein before described, to be truly run, surveyed, and laid out, and return thereof made to the secretary of the treasury, for the time being, within the space of five years, from and after the date of these presents; otherwise, as well these presents, as the estate hereby granted, shall cease and become void: which parallel of latitude shall be run from certain points or stations, which shall have been ascertained and fixed by Israel Ludlow, upon the said Great and Little Miami rivers, according to a survey by him made, of the courses of the said rivers, under the direction of the department of the treasury, and heretofore certified to that department, by a certificate, bearing date the twenty-fourth day of March, seventeen hundred and ninety-four, and in pursuance of the said act of the congress of the United States, herein beforementioned, passed the fifth day of May, one thousand seven hundred and ninety-two: it is hereby declared, that one complete township or tract of land, of six miles square, to be located with the approbation of the governor, for the time being, of the territory northwest of the river Ohio, and in the manner, and within the term of five years aforesaid, as nearly as may be, in the centre of the tract of land herein before granted, hath been and is granted, and shall be holden in trust, to and for the sole and exclusive intent and purpose of erecting and establishing therein an academy and other public schools and seminaries of learning, and endowing and supporting the same, and to and for no other use, intent, or purpose whatever.

In testimony whereof, I have caused these letters to be made patent, and the seal of the United States to be hereunto affixed.

Given under my hand, at the city of Philadelphia, the thirtieth day of September, in the year of our Lord one thousand seven hundred and ninety-four, and of the independence of the United States of America the nineteenth.

GEO. WASHINGTON.

By the president,

EDMUND RANDOLPH.

Letter by President Washington to Commissioners Negotiating Indian Treaties

4 American State Papers, "Indian Affairs" Vol. 1, Serial Set No. 7 (ed. Lowrie & Clark 1832)

Instructions to the Commissioners for treating with the Southern Indians.

To BENJAMIN LINCOLN, CYRUS GRIFFIN, and DAVID HUMPHREYS, Esq'rs.

Commissioners Plenipotentiary for negotiating and concluding treaties of peace with the independent tribes or nations of Indians within the limits of the United States, south of the river Ohio.

GENTLEMEN:

The United States consider it as an object of high national importance, not only to be at peace with the powerful tribes or nations of Indians south of the Ohio, but, if possible, by a just and liberal system of policy, to conciliate and attach them to the interests of the Union.

In order, therefore, that you may be possessed of all the information relative to the Southern Indians contained in the public documents, you have herewith delivered to you, copies of the following papers, to wit:

The several statements which have been made on the subject from the war office, to which are added, copies of the treaties which have been made by the United States with the Cherokees, Chickasaws, and Choctaws, and the commissioners' reports thereon; the proceedings and reports of James White, Esq. superintendent for the Southern district; the reports of Messrs. Winn and Martin, temporary superintendents; the resolves of Congress, under which commissioners have been appointed by the States of North Carolina, South Carolina, and Georgia, and the said commissioners' reports; and, also, certain

papers transmitted by Georgia against Joseph Martin, one of the aforesaid temporary commissioners.

The first great object of your mission is to negotiate and establish peace between the State of Georgia and the Creek nation. The whole nation must be fully represented, and solemnly acknowledged to be so by the Creeks themselves.

You will find the ostensible, and probably the real cause of the hostilities between Georgia and the Creeks, to consist in a difference of judgment of three treaties, stated to have been made between the said parties, to wit: At Augusta, in 1783; at Galphinton, in 1785; and at Shoulderbone, in 1786; copies of which you have herewith delivered to you.

It is a circumstance of the highest consequence, to investigate thoroughly all the facts under which the said treaties were made. The official papers will afford you great information on this subject.

On the one side, the objections against the justice of said treaties, are stated in the several communications of Mr. McGillivray, and the communications of the Lower Creeks to Mr. White, the superintendent.

On the other side, the statement made by the Legislature of Georgia, contains the reasons in support of the treaties.

The opinion of the commissioners of the United States of the treaty of Galphinton, is contained in their reports; and the communications of James White, Esq. the superintendent, will show his judgment on the case.

But, in addition to all these written evidences, it may be proper, in order that the investigation be conducted with the most perfect impartiality, to have such viva voce testimony as can be obtained.

For this purpose, you will request the Governor and Legislature of Georgia, if in session, to authorize such

person or persons to attend the treaty as he or they may think proper, in order to give you such information as you may request, from time to time, of the transactions relative to said treaties.

You will also endeavor to ascertain the facts relative to the said treaties, from the Creeks.

And you will further endeavor to obtain information, on oath, of the manner in which the said treaties were held, from such unprejudiced respectable private characters, who were present at the said treaties, as you shall be able to find.

The main points to be ascertained, are—

1st. Whether all the lands belonging to the Upper and Lower Creeks are the common property of the whole nation? Or,

2d. Were the lands stated to have been ceded to Georgia by the three treaties, or either of them, acknowledged by the Upper Creeks to be the sole property of the Lower Creeks?

3d. Were the acknowledged proprietors of the lands, stated to have been ceded to Georgia, present, or fully represented, at the said three treaties?

4th. Did the Creeks, present at the said treaties, act with a full understanding of the cessions they are stated to have made?

5th. Were the said treaties and cessions freely made on the part of the Creeks, uninfluenced by any threats or implication of force?

These circumstances, and all others connected therein, must be critically examined into, in order that you may form your judgment on the said treaties with the greatest accuracy.

If the result of your investigation should be, that the said three treaties, and the cessions of land therein con-

tained, were made by a full and authorized representation of the Creek nation, or that the cessions of land was obtained with the full understanding and free consent of the acknowledged proprietors, and that there were no circumstances of unfairness or constraint of any sort, used to induce the Creeks to make the cessions to Georgia, in this case precisely, you are to insist on a formal renewal and confirmation *of said cessions to Georgia*, or such parts thereof as you shall find just. If the Creeks, after hearing all your arguments for the renewal of the said treaties, so far as the same may respect the confirmation of such parts of the cessions of land contained therein, as you shall have adjudged just and equitable, should obstinately refuse to confirm the same to Georgia, then you are to inform them that the arms of the Union will be called forth for the protection of Georgia, in the peaceable and just possession of said lands; and in case the Creeks attempt any molestation or injury to Georgia, that they will be deemed the enemies of the United States, and punished accordingly.

But if it should result from your inquiries, that the said treaties and cessions were obtained, on the part of Georgia, under such circumstances as to preclude the interference of the United States, consistently with their justice and dignity, you are not to urge or persuade the Creeks to a renewal or confirmation thereof.

It is, however, to be observed, that Georgia has proceeded on the principle that the cession stated to have been made at Augusta, in 1783, was fairly obtained; and that the said State has surveyed and divided the lands between the Ogechee and Oconee among certain descriptions of its citizens; that the said citizens have settled and planted on said lands in great numbers. Should, therefore, the result of your investigation be unfavorable to the claims of Georgia, it would be highly embarrassing to that State to relinquish the said lands to the Creeks.

Hence it will be an important accommodation to Georgia to obtain from the Creeks a regular conveyance of the said lands lying between the Ogechee and Oconee.

To accomplish this object, therefore, you are specially required to use your highest exertions with the Creeks. On your success materially depends the internal peace of Georgia, and probably its attachment to the General Government of the United States.

If the prejudices of the Creeks against the United States are not too deeply rooted, it is presumed that such advantages to that nation can be stipulated as to induce them not only to relinquish to Georgia the lands in question, but to attach them sincerely and permanently to the United States.

The disputed lands being entirely despoiled of their game by the settlements, are therefore no longer valuable to the Creeks as hunting grounds. If they have not been fairly purchased of the real proprietors by Georgia, it ought to be done. In case the Creeks, therefore, would be willing to make a proper conveyance for a given sum, you will stipulate that the same shall be paid by Georgia at a certain period, or, in case of failure, by the United States.

While negotiating the price to be given for the said land, you will have due regard to the sums which Georgia actually paid at the treaty of Augusta, to the present value of the lands as hunting grounds, and to the other considerations hereafter specified.

In this part of the negotiation, it would be desirable that the persons who may be appointed by the Governor or Legislature of Georgia to attend the treaty, should concur with you as to the sum which, in case of purchase, shall be stipulated to be given.

In addition to the purchase money for the lands, and for further great purpose of attaching the Creeks to the United States, provided the same, in your mature judg-

ments, should be necessary, you are hereby empowered to make the following stipulations:

1st. A secure port to the Creeks, or their head men, on the Altamaha, St. Mary's, or any place between the said rivers, into which, or from which, the Creeks may import or export the articles of merchandise necessary to the Indian commerce, on the same terms as the citizens of the United States. The number of arms and quantity of ammunition, however, to be regulated by the quantity that shall be regarded as necessary for the hunters.

If any apprehension should be entertained on the part of the Creeks on account of the safety of the goods which they might so import or export, it may be stipulated that the same should be protected by a company of the regular troops of the United States.

The trade of the Creeks is said at present to be engrossed by a company of British merchants, stationed at one of the Bahama islands, who have connected Mr. McGillivray with them as a partner. The Spaniards have permitted some of the rivers which empty into the Gulf of Mexico to be the channel of this trade for a certain number of years. Some impediments or impositions of duties appear to have disgusted Mr. Gillivray with the Spaniards, or with the communication, and renders him desirous of a port in the United States. If these circumstances could be the means of breaking his connexion with the Spanish colonies, it would be wise policy to afford the Creeks a port, and to protect them in every thing relative thereto.

2ndly. Gifts in goods, or money to some, and, if necessary, honorary military distinctions to others, of the influential chiefs.

The presents will be regulated by your judgment. The idea of military distinction arises from the information that Mr. McGillivray possesses a commission of Colonel or Lieutenant Colonel from the King of Spain.

If he could be induced to resign that commission by the offer of one a grade higher, the offer ought to be made and substantiated, on his taking a solemn oath of allegiance to the United States.

Mr. McGillivray is stated to possess great abilities, an unlimited influence over the Creek nation, and part of the Cherokees. It is an object worthy of considerable exertion to attach him warmly to the United States.

The measure could be attempted and urged with great propriety, as it respects his fidelity to the Creeks, and the continuance of his own importance in that nation.

The United States do not want the Creek lands; they desire only to be friends and protectors of the Creeks, and to treat them with humanity and justice.

In case you should be satisfied of his compliance with your desires, you will deliver him the presents which are particularly designated for him, and also give him assurances of such pecuniary rewards from the United States as you may think reasonable, consequent on the evidence of his future favorable conduct.

3rdly. If you should find the measure necessary, in order to accomplish the before recited objects, you will further stipulate a solemn guarantee of the United States to the Creeks of their remaining territory, to be supported, if necessary, by a line of military posts.

This measure will, most probably, be highly satisfactory to the Creeks, as it will entirely prevent any attempts to purchase any part of their lands, and it will, at the same time, impress them with the moderation and justice of the General Government.

If these offers, with all the benefits resulting therefrom, should be insufficient to induce the Creeks to agree, voluntarily, to relinquish the disputed lands between the Ogeechee and Oconee rivers, you cannot, with propriety, make a tender of more favorable conditions.

In this event, however, you may endeavor to conclude a treaty, and establish therein a temporary boundary, making the Oconee the line—to stipulate the secure port, and the pecuniary and honorary considerations before recited.

You will establish the principle, in case of concluding a treaty, that the Creeks, who are within the limits of the United States, acknowledge themselves to be under the protection of the United States of America, and of no other sovereign whosoever; and, also, that they are not to hold any treaty with an individual State, nor with individuals of any State.

You will also endeavor, without making it an ultimatum, to establish such direct trade as the Government of the Union shall authorize. This point, however, is to be managed with the greatest delicacy, for the before recited reasons.

In the general objects of the restoration of prisoners, negroes, &c. you will conform to the treaties of Hopewell with the Cherokees, Chickasaws, and Choctaws.

You will, also, endeavor to obtain a stipulation for certain missionaries, to reside in the nation, provided the General Government should think proper to adopt the measure. These men to be precluded from trade, or attempting to purchase any lands, but to have a certain reasonable quantity, per head, allowed for the purpose of cultivation. *The object of this establishment would be the happiness of the Indians, teaching them the great duties of religion and morality, and to inculcate a friendship and attachment to the United States.* (Emphasis added.)

If, after you have made your communications to the Creeks, and you are persuaded that you are fully understood by them, they should refuse to treat and conclude a peace, on the terms you propose, it may be concluded that they are decided on a continuance of acts of hostility,

and that they ought to be guarded against as the determined enemies of the United States.

In this case, you will report such plans, both for defensive and offensive measures, so as best to protect the citizens of the United States on the frontiers, from any acts of injury or hostility of the Creeks. Although the policy of attaching influential chiefs by pecuniary or honorary considerations, may not be doubted, yet it has been otherwise, with respect to making presents to the commonalty among the Indians. In case, therefore, you find that the Creeks are willing to relinquish the land between the Ogechee and Oconee, on further payments for the same, you will endeavor to stipulate, that the mass of the goods you have in charge for the treaty, should be received by the Indians as part, or the whole of the consideration for the conveyance of the said lands, as you shall judge proper.

Messrs. Osborne and Pickens have, in their report of the 30th June last, stated, that they have agreed to hold a general treaty with the Creeks at the Rock Landing, on the Oconee river, in the State of Georgia, on the 15th of September next ensuing; you will make every exertion to be there at that time. Immediately on your arrival at Savannah you will arrange the transportation by land or water, of the goods and provisions under your direction, to the place of treaty, or towards the same, so as to arrive with all possible expedition. At the same time, you will despatch expresses to the Governor, notifying him of your commission and arrival, and also to Messrs. Osborne and Pickens; and as soon after as possible, you will repair to the place affixed for treating. The troops and the goods may follow agreeably to your directions. Perhaps you may change the place of treaty, to some place to which your goods might be transported with greater facility than the Rock Landing on the Oconee river.

But, notwithstanding your greatest exertions, it may happen that your arrival may be so retarded, that Messrs.

Pickens and Osborne may have held a treaty, and the Indians may have departed to their own country.

In this case you will carefully enquire, whether there were present at the treaty, a full representation of the whole Creek nation, and particularly Mr. McGillivray, and whether the treaty was made under such circumstances as to be consistent with the justice of the United States, and conformable to the spirit of their instructions. If so, you will confirm and ratify the same, in as full a manner as if you had been actually present. But, if an inadequate representation only should have been present, or any circumstances should have been adopted, of which the United States could not with justice and dignity approve, in this case you will use your best endeavors to persuade the Creeks to attend a new treaty, at such place and at such time as you may judge proper. You will observe the same conduct to collect the Creeks, in case it should appear that they, from any circumstances, are disinclined to attend generally the treaty on the 15th of September, or provided your arrival should be posterior to that period, and you shall learn they did not attend, agreeably to the invitation of Messrs. Pickens and Osborne.

During your negotiations with the Creeks, you will endeavor to ascertain the following points:

1st. The number of warriors in the whole nation, including Upper and Lower Creeks and Seminoles.

2d. Whether they are armed with common and rifle muskets, or in any other manner, and how furnished with ammunition.

3d. The number of each division of Upper Creeks, Lower Creeks, and Seminoles.

4th. The number of women and children and old men in each district.

5th. The number of towns in each district.

6th. The names, characters, and residence, of the most influential chiefs; and, as far as the same may be, their grades of influence.

7th. The kinds of government, if any, of the towns, districts, and nations.

8th. Whether they are hunters only, or whether they cultivate and possess cattle, if so, the degree of cultivation and number of cattle.

9th. The usual hunting grounds of the whole nation and their districts.

10th. The kinds and value of furs taken annually, and how disposed of.

11th. The amount of the European goods annually consumed.

12th. Whether ginseng abounds in that country; if so, whether it is gathered in any considerable quantities.

13th. To ascertain the nature of the country west from Georgia to the Mississippi; whether mountainous, hilly, level, or abounding with low grounds and morasses—the nature of the soil and growth.

14th. To ascertain particularly, how far northward the waters of the Mobile, Apalachicola, and Altamaha rivers, are navigable for boats, and the nearest land portages from the northern navigable streams of said rivers, to the southern navigable waters or streams of the Tennessee river.

The accurate knowledge of this subject is of considerable importance, but the inquiries thereto should be circuitously conducted.

15th. To ascertain with great precision the nature of the connexion of the Creeks with the Spaniards, and, if practicable, to obtain copies of any treaties between them; whether the predominating prejudices of the Creeks are

in favor, or against the Spaniards, and particularly the state of Mr. McGillivray's mind on this subject.

16th. You will endeavor, as far as your opportunities will admit, to ascertain similar facts relative to the Cherokees, Chickasaws, and Choctaws, as are contained in the before recited requests relative to the Creeks.

In case of your concluding a treaty with the Creeks, and it should be your judgment that a line of military posts would be necessary to the due observance thereof, and also as a security of the peace of the Cherokees, you will report a plan for the stations which should be taken, and the number of troops which should occupy each.

The people who are settled on Cumberland river have just cause of complaints against the Creeks, who have, during the present year, murdered several families within that district. The Creeks can have no cause of complaint against that settlement.

This circumstance is to be strongly stated to the Creeks, and in case of a continuance of their murders, the vengeance of the Union is to be denounced against them.

The peculiar case of the Cherokees seems to require the immediate interposition of the justice of the United States. But as that nation of Indians are principally resident within the territory claimed by North Carolina, which is not a member of the present Union, it may be doubted whether any efficient measures in favor of the Cherokees could be adopted immediately.

By the public newspapers it appears, that, on the 16th June last, a truce was concluded with the Cherokees by Mr. John Steele, on behalf of the State of North Carolina. In this truce a treaty was stipulated to be held as soon as possible; and in the mean time, all hostilities should cease on both sides.

In the event of North Carolina adopting the constitution of the United States, it will incumbent on the Gen-

eral Government to take every wise measure to carry into effect the substance of the treaty of Hopewell; in the mean time, you will send a message to the Cherokees, stating to them the difficulties arising from the local claims of North Carolina, as far as the same may be proper. That, when these shall be removed, the United States will convince the Cherokees of their justice and friendship.

You will also transmit a message to the whites in the neighborhood of the Cherokees, enjoining an observance of the truce made by Mr. Steel, until a general treaty shall take place, when justice shall be administered to all parties.

The two Cherokees who have lately come to this city, with their conductor, Mr. Bennet Ballew, are to go under your direction to the place of treaty. Good policy requires that they should be kindly treated, although there are suspicions that the conduct of Bennet Ballew has not been very proper with respect to the lands of the Cherokees. You will endeavor to ascertain his real character and designs, and make such use of him as you shall think proper. You have delivered to you copies of the papers which Mr. Ballew presented from the Cherokees.

The treaties with the Choctaws and Chicksaws will inform you of the stipulations of the United States to extend trade to those nations. You will report a plan for carrying into effect the said stipulations, and you will also transmit to the said nations messages containing assurances of the continuance of the friendship of the United States, and of the intentions of the General Government of extending the trade to them, agreeably to the treaties of Hopewell. You will have regular invoices of all articles delivered to you for the proposed treaty, and you will keep fair accounts of all your disbursements, which you will regularly settle at the treasury of the United States.

And in all cases where the same may be proper, consistently with the secrecy necessary to be observed, the delivery of the goods ought to be attested by the commissioned officers of the troops, who should attend the commissioners.

You will also keep a regular journal of your transactions, and report the same.

It is presumed that you will conduct all your disbursements by that proper economy so necessary to be observed in all transactions of the General Government. You will learn, by the papers delivered to you, that certain goods were left by the commissioners after the treaties at Hopewell, in the commencement of the year 1786. It is probable that these goods may have been delivered to Messrs. Pickens and Osborne; you will, therefore, apply to said gentlemen for regular invoices of all the goods in their possession, for the treaty, distinguishing the means by which they became possessed thereof.

You will also request of them an account of the moneys or goods they may have received of the States of South Carolina and Georgia, in consequence of the resolves of Congress, of the 26th October, 1787, and August 14, 1788.

As the said Messrs. Pickens and Osborne will most probably be at the proposed place of treaty, with the expectation of conducting the same, you will deliver them the letter containing the reasons of Government for appointing new commissioners.

Were there any services at the treaty, in which you could employ them, it might be proper to do so.

You will endeavor to avail yourselves, as far as may be, of any arrangements which may have been taken by Georgia, for the supplies of provisions during the holding of the treaty, or for furnishing the means of transportation, for which the said State will have credit on

the before recited requisitions of Congress, of the 26th October, 1787, and the 14th of August, 1788.

You will please to observe, that the whole sum that can be constitutionally expended for the proposed treaty with the Creeks, shall not exceed the sum of twenty thousand dollars—the goods and money which have been delivered to you, and the expenses which will arise, by the removal and return of the troops, and your own pay, will amount to ——.

You will, therefore, see the necessity of economizing your means, and that the same cannot be extended.

It is, however, to be observed, that the sums you shall think proper to stipulate to the Creeks, for the cessions of the lands between the Ogechee and Oconee, is to be considered additional to the said twenty thousand dollars.

You will, from time to time, communicate your progress to the Secretary of the War Department, and receive such further directions from him, as the case may require.

The company of artillery, commanded by Captain Burbeck, will accompany you to the place of treaty, and be under your orders. As soon as the treaty shall be finished, you will take the proper measures for the return of the company to this place, as the time of service will soon expire. The company will receive one month and a half's pay, and be furnished with three months' rations, which you will cause to be transported as the service may require.

These instructions will be the governing principles of your conduct, and they are to be regarded as secret.

But many circumstances may arise, which may render some degree of modification necessary. In every event, however, you will please to remember, that the Government of the United States are determined, that their administration of Indian affairs shall be directed entirely by the great principles of justice and humanity.

As soon as you have concluded your negotiations with the Creeks, and forwarded your messages as herein directed, you will return to this place, and make a full report of all your transactions to the Secretary of the War Department.

Given under my hand, at the city of New York, this 29th of August, 1789.

GEO. WASHINGTON.

By command of the President of the United States:

H. KNOX.

Act of April 26, 1802

Laws of the United States—Relating to the Public Lands 473 (1828)

No. 95. An act in addition to an act, entitled "An act in addition to an act regulating the grants of land appropriated for military services, and for the Society of the United Brethren for propagating the Gospel among the Heathen." †

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, from and after the passing of this act, and until the first day of January next, it shall be lawful for the holders or proprietors of warrants heretofore granted in consideration of military services, or Register's certificates, of fifty acres or more, granted, or hereafter to be granted, agreeably to the third section of an act, entitled "An act in addition to an act, entitled 'An act regulating the grants of land appropriated for military services, and for the *Society of the United Brethren for propagating the Gospel among the Heathen*," approved the first day of March, one thousand eight hundred, to register and locate the same in the same manner, and under the same restrictions, as might have been done before the first day of January last: *Provided*, That persons holding Register's certificates for a less quantity than one hundred acres, may locate the same on such parts of fractional townships as shall, for that purpose, be divided by the Secretary of the Treasury into lots of fifty acres each. (Emphasis added.)

SEC. 2. *And be it further enacted*, That it shall be the duty of the Secretary of War to receive claims to lands for military services, and claims for duplicates of warrants, issued from his Office, or from the Land Office of Virginia, or of plats and certificates of surveys founded on such warrants, suggested to have been lost or destroyed, until the first day of January next, and no

longer; and, immediately thereafter, to report the same to Congress, designating the numbers of claims of each description, with his opinion thereon.

Act of March 3, 1803

Laws of the United States—Relating to the Public Land 491 (1828)

No. 103. An act to revive and continue in force "An act in addition to an act, entitled 'An act in addition to an act regulating the grants of land appropriated for military services, and for the Society of the United Brethren for propagating the Gospel among the Heathen;"† and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first section of "An act in addition to an act, entitled 'An act in addition to an act regulating the grants of land appropriated for military services, and for the Society of the United Brethren, for propagating the Gospel among the Heathen," approved the twenty-sixth of April, eighteen hundred and two, be, and the same is hereby, revived, and continued in force until the first day of April next.‡

SEC. 2. *And be it further enacted*, That the Secretary of War be, and he hereby is, authorized, from and after the first day of April next, to issue warrants for military bounty lands to the two hundred and fifty-four persons who have exhibited their claims, and produced satisfactory evidence to substantiate the same to the Secretary of War, in pursuance of the act of the twenty-sixth of April, eighteen hundred and two, entitled "An act in addition to an act, entitled 'An act in addition to an act regulating the grants of land appropriated for military services, and *for the Society of the United Brethren for propagating the Gospel among the Heathen.*" (Emphasis added.)

SEC. 3. *And be it further enacted*, That the holders, or proprietors, of the land warrants issued by virtue of the preceding section, shall and may locate their respective warrants, only on any unlocated parts of the fifty quarter

townships and the fractional quarter townships which had been reserved for original holders, by virtue of the fifth section of an act, entitled "An act in addition to an act, entitled an act regulating the grants of land appropriated for military services, and *for the Society of the United Brethren for propagating the Gospel among the Heathen.*" § (Emphasis added.)

SEC. 4. *And be it further enacted*, That the Secretary of War be, and he is hereby, authorized to issue land warrants to Major General Lafayette, for eleven thousand five hundred twenty acres, which shall, at his option, be located, surveyed, and patented, in conformity with the provisions of an act, entitled "An act regulating the grants of land appropriated for military services, and *for the Society of the United Brethren for propagating the Gospel among the Heathen*," * or which may be received, acre for acre, in payment for any of the lands of the United States North of the river Ohio, and above the mouth of Kentucky river. (Emphasis added.)

SEC. 5. *And be it further enacted*, That all the unappropriated lands within the military tract, shall be surveyed into half sections, in the manner directed by the act, entitled "An act to amend the act, entitled 'An act providing for the sale of the lands of the United States in the territory Northwest of the Ohio, and above the mouth of Kentucky river,"† and that so much of the said lands as lie West of the eleventh range, within the said tract, shall be attached to, and make a part of, the district of Chilicothe, and be offered for sale at that place, under the same regulations that other lands are within the said district.

SEC. 6. *And be it further enacted*, That the lands within the said eleventh range, and East of it, within the said military tract, and all the lands North of the Ohio Company's purchase, West of the seven first ranges, and East of the district of Chilicothe, shall be offered for sale at Zanesville, under the direction of a Register of the

Land Office, and Receiver of Public Moneys, to be appointed for that purpose, who shall reside at that place, and shall perform the same duties, and be allowed the same emoluments, as are prescribed for, and allowed to, Registers and Receivers of the Land Offices by law.

SEC. 7. *And be it further enacted*, That all persons who have obtained certificates for the right of pre-emption to lands, by virtue of two acts, the one entitled "An act giving a right of pre-emption to certain persons who have contracted with John Cleves Symmes, or his associates, for lands lying between the Miami rivers, in the territory of the United States Northwest of the Ohio,"‡ and the other "An act to extend and continue the provisions" of the said act, passed on the first day of May, eighteen hundred and two § and who have not made the first payment therefor, before the first day of January last, shall be allowed until the tenth day of April next to complete the same; and that all persons who have become purchasers of land by virtue of the aforesaid acts, be, and they are hereby, allowed until the first day of January, eighteen hundred and five, to make the second instalment; until the first day of January, eighteen hundred and six, to make their third instalment; and until the first day of January, eighteen hundred and seven, to make their fourth and last instalment; any thing in the acts aforesaid to the contrary notwithstanding.

SEC. 8. *And be it further enacted*, That, where any warrants, granted by the State of Virginia for military services, have been surveyed on the Northwest side of the river Ohio, between the Sciota and the Little Miami rivers, and the said warrants, or the plats and certificates of survey made thereon, have been lost or destroyed, the persons entitled to the said land may obtain a patent therefor, by producing a certified duplicate of the warrant from the Land Office of Virginia, or of the plat and certificate of survey from the office of the Surveyor in which the same was recorded, and giving satisfactory

proof to the Secretary of War, by his affidavit, or otherwise, of the loss or destruction of said warrant, or plat and certificate of survey.

Enabling Act for Alabama, March 2, 1819

F. Thorpe, 1 *Constitution, Charters, and Other Organic Laws* 92 (1909)

ENABLING ACT FOR ALABAMA—1819

[FIFTEENTH CONGRESS, SECOND SESSION.]

An Act to enable the people of the Alabama Territory to form a constitution and State government, and for the admission of such State into Union on an equal footing with the original States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of the Territory of Alabama be, and they are hereby, authorized to form for themselves a constitution and State government, and to assume such name as they may deem proper; and that the said Territory, when formed into a State, shall be admitted into the Union, upon the same footing with the original States, in all respects whatever.

SEC. 2. *And be it further enacted*, That the said State shall consist of all the territory included within the following boundaries, to wit: Beginning at the point where the thirty-first degree of north latitude intersects the Perdido River; thence, east, to the western boundary-line of the State of Georgia; thence, along said line, to the southern boundary-line of the State of Tennessee; thence, west, along said boundary-line, to the Tennessee River; thence, up the same, to the mouth of Bear Creek; thence, by a direct line, to the northwest corner of Washington County; thence, due south, to the Gulf of Mexico; thence, eastwardly, including all islands within six leagues of the shore, to the Perdido River; and thence, up the same to the beginning.

SEC. 3. *And be it further enacted*, That it shall be the duty of the surveyor of the lands of the United

States south of the State of Tennessee, and the surveyor of the public lands in the Alabama Territory, to run and cut out the line of demarcation, between the State of Mississippi and the State to be formed of the Alabama Territory; and if it should appear to said surveyors that so much of said line designated in the preceding section, running due south, from the northwest corner of Washington County to the Gulf of Mexico, will encroach on the counties of Wayne, Greene, or Jackson, in said State of Mississippi, then the same shall be so altered as to run in a direct line from the northwest corner of Washington County to a point on the Gulf of Mexico, ten miles east of the mouth of the river Pascagola.

SEC. 4. *And be it further enacted*, That all white male citizens of the United States, who shall have arrived at the age of twenty-one years, and have resided in said Territory three months previous to the day of election, and all persons having, in other respects, the legal qualifications to vote for representatives in the general assembly of the said Territory, be, and they are hereby, authorized to choose representatives to form a constitution, who shall be appointed among the several counties as follows:

From the county of Madison, eight representatives.
From the county of Monroe, four representatives.
From the county of Blount, three representatives.
From the county of Limestone, three representatives.
From the county of Shelby, two representatives.
From the county of Montgomery, two representatives.
From the county of Washington, two representatives.
From the county of Tuscaloosa, two representatives.
From the county of Lawrence, two representatives.
From the county of Franklin, two representatives.
From the county of Cotaco, two representatives.
From the county of Clark, two representatives.
From the county of Baldwin, one representative.
From the county of Cawhauba, one representative.

From the county of Conecah, one representative.
From the county of Dallas, one representative.
From the county of Marengo, one representative.
From the county of Marion, one representative.
From the county of Mobile, one representative.
From the county of Lauderdale, one representative.
From the county of Saint Clair, one representative.
From the county of Autauga, one representative.

And the election for the representatives aforesaid shall be holden on the first Monday and Tuesday in May next, throughout the several counties in the said Territory, and shall be conducted in the same manner, and under the same regulations, as prescribed by the laws of the said Territory regulating elections therein for the members of the House of Representatives.

SEC. 5. *And be it further enacted*, That the members of the convention, thus duly elected, be, and they are hereby, authorized to meet, at the town of Huntsville, on the first Monday in July next; which convention, when met, shall first determine, by a majority of the whole number elected, whether it be, or be not, expedient, at that time, to form a constitution and State government for the people within the said Territory; And if it be determined to be expedient, the convention shall be, and hereby are, authorized to form a constitution and State government: *Provided*, That the same, when formed shall be republican, and not repugunant to the principles of the ordinance of the thirteenth of July, one thousand seven hundred and eighty-seven, between the people and States of the territory northwest of the river Ohio, so far as the same has been extended to the said territory, by the articles of agreement between the United States and the State of Georgia, or of the Constitution of the United States.

SEC. 6. *And be it further enacted*, That the following propositions be, and the same are hereby, offered to the convention of the said Territory of Alabama, when

formed, for their free acceptance or rejection, which, if accepted by the convention, shall be obligatory upon the United States.

First. That the section numbered sixteen in every township, and when such section has been sold, granted, or disposed of, other lands equivalent thereto, and most contiguous to the same, shall be granted to the inhabitants of such townships for the use of schools.

Second. That all salt-springs within the said Territory, and the lands reserved for the use of the same, together with such other lands as may, by the President of the United States, be deemed necessary and proper for working the said salt-springs, not exceeding in the whole the quantity contained in thirty-six entire sections, shall be granted to the said State, for the use of the people of the said State, the same to be used, under such terms, conditions, and regulations, as the legislature of the said State shall direct: *Provided*, The said legislature shall never sell nor lease the same for a longer term than ten years at any one time.

Third. That five per cent, of the proceeds of the lands lying within the said Territory, and which shall be sold by Congress, from and after the first day of September, in the year one thousand eight hundred and nineteen, after deducting all expenses incident to the same, shall be reserved for making public roads, canals, and inproving the navigation of rivers, of which three-fifths shall be applied to those objects within the said State, under the direction of the legislature thereof, and two-fifths to the making of a road or roads leading to the said State, under the direction of Congress.

Fourth. That thirty-six sections, or one entire township, to be designated by the Secretary of the Treasury, under the direction of the President of the United States, together with the one heretofore reserved for that purpose, shall be reserved for the use of a seminary of learn-

ing, and vested in the legislature of the said State, to be appropriated solely to the use of such seminary by the said legislature. And the Secretary of the Treasury, under the direction as aforesaid, may reserve the seventy-two sections, or two townships, hereby set apart for the support of a seminary of learning, in small tracts: *Provided*, That no tract shall consist of less than two sections: *And provided always*, That the said convention shall provide, by an ordinance irrevocable without the consent of the United States, that the people inhabitating the said Territory, do agree and declare that they forever disclaim all right and title to the waste or unappropriated lands lying within the said Territory; and that the same shall be and remain at the sole and entire disposition of the United States; and, moreover, that each and every tract of land sold by the United States, after the first day of September, in the year one thousand eight hundred and nineteen, shall be and remain exempt from any tax laid by the order, or under the authority, of the State, whether for State, county, township, parish, or any other purpose whatever, for the term of five years, from and after the respective days of the sales thereof; and that the lands belonging to citizens of the United States, residing without the said State, shall never be taxed higher than the lands belonging to persons residing therein; and that no tax shall be imposed on lands, the property of the United States; and that all navigable waters within the said State shall forever remain public highways, free to the citizens of said State and of the United States, without any tax, duty, impost, or toll, therefor, imposed by the said State.

SEC. 7. *And be it further enacted*, That, in lieu of a section of land, provided to be reserved for the seat of government of the said Territory, by an act, entitled "An act respecting the surveying and sale of the public lands in the Alabama Territory," there be granted to the said State, for the seat of the government thereof, a

tract of land containing sixteen hundred and twenty acres, and consisting of sundry fractions and a quarter-section, in sections thirty-one and thirty-two, in township sixteen, and range ten, and in sections five and six, in township fifteen, and range ten, and in sections twenty-nine and thirty, in the same township and range, lying on both sides of the Alabama and Cahawba Rivers, and including the mouth of the river Cahawba, and which heretofore has been reserved from the public sale, by order of the President of the United States.

SEC. 8. *And be it further enacted*, That, until the next general census shall be taken, the said State shall be entitled to one Representative in the House of Representatives of the United States.

SEC. 9. *And be it further enacted*, That, in case the said convention shall form a constitution and State government for the people of the Territory of Alabama, the said convention, as soon thereafter as may be, shall cause a true and attested copy of such constitution or frame of government as shall be formed or provided, to be transmitted to Congress, for its application.

Approved, March 2, 1819.

RESOLUTION FOR THE ADMISSION OF ALABAMA—1819

[SIXTEENTH CONGRESS, FIRST SESSION]

Resolution declaring the admission of the State of Alabama into the Union.

Whereas, in pursuance of an act of Congress, passed on the second day of March, one thousand eight hundred and nineteen, entitled "An act to enable the people of the Alabama territory to form a constiution and state government, and for the admission of such state into the Union on an equal footing with the original States," the people of the said territory did, on the second day of

August, in the present year, by a convention called for that purpose, form for themselves a constitution and state government, which constitution and state government, so formed, is republican, and in conformity to the principles of the articles of compact between the original states and the people and states in the territory northwest of the river Ohio, passed on the thirteenth day of July, one thousand seven hundred and eighty-seven, so far as the same have been extended to the said territory by the articles of agreement between the United States and the state of Georgia:—

Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, That the State of Alabama shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original states, in all respects whatever.

Approved, December 14, 1819.

APPENDIX B

Joseph Story, 3 *Commentaries on the Constitution* (1833) (1858 ed.)

§ 1869. Let us now enter upon the consideration of the amendments, which, it will be found, principally regard subjects properly belonging to a bill or rights.

§ 1870. The first is, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition government for a redress of grievances."

§ 1871. And first, the prohibition of any establishment of religion, and the freedom of religious opinion and worship.

How far any government has a right to interfere in matters touching religion, has been a subject much discussed by writers upon public and political law. The right and the duty of the interference of government in matters of religion, have been maintained by many distinguished authors, as well those who were the warmest advocates of free government, as those who were attached to governments of a more arbitrary character.[4] Indeed, the right of a society or government to interfere in matters of religion will hardly be contested by any persons who believe that piety, religion, and morality are intimately connected with the well-being of the state, and indispensable to the administration of civil justice. The promulgation of the great doctrines of religion, the being,

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[4] See Grotins, B. 2, ch. 20, § 44 to 51; Vattel, B. 1, ch. 12, § 125, 126; Hooker's Ecclesiastical Polity, B. 5, § 1 to 10; Bynkershock, 2 P. J. Lib. 2, ch. 18; Woodesou's Elem. Lect. 3, p. 49; Burlemaqui, Pt. 3, ch. 3, p. 171, and Montesq. B. 24, ch. 1 to ch. 8, ch. 14 to ch. 16, B. 25, ch. 1, 2, 9, 10, 11, 12.

and attributes, and providence of one Almighty God; the responsibility to him for all our actions, founded upon moral freedom and accountability; a future state of rewards and punishments; the cultivation of all the personal, social, and benevolent virtues;—these never can be a matter of indifference in any well ordered community.[1] It is, indeed difficult to conceive how any civilized society can well exist without them. And at all events, it is impossible for those who believe in the truth of Christianity, as a divine revelation, to doubt, that it is the especial duty of government to foster and encourage it among all the citizens and subjects. This is a point wholly distinct from that of the right of private judgment in matters of religion, and of the freedom of public worship according to the dictates of one's conscience.

§ 1872. The real difficulty lies in ascertaining the limits to which government may rightfully go in fostering and encouraging religion. Three cases may easily be supposed. One where a government affords aid to a particular religion, leaving all persons free to adopt any other; another, where it creates an ecclesiastical establishment for the propagation of the doctrines of a particular sect of that religion, leaving a like freedom to all others; and a third, where it creates such an establishment, and excludes all persons not belonging to it, either wholly or in part, from any participation in the public honors, trusts, emoluments, privileges, and immunities of the state. For instance, a government may simply declare, that the Christian religion shall be the religion of the state, and shall be aided and encouraged in all the varieties of sects belonging to it; or it may declare that the Catholic or Protestant religion shall be the religion of the state, leaving every man to the free enjoyment of his own religious opinions; or it may establish the doctrines of a particular sect, as of Episcopalians, as the religion of the state, with a like freedom; or it may establish the doc-

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[1] See Burlemaqui, Pt. 3, ch. 3, p. 171, &c.; 4 Black. Comm. 43.

trines of a particular sect, as exclusively the religion of the state, tolerating others to a limited extent, or excluding all not belonging to it, from all public hoonrs, trusts, emoluments, privileges, and immunities.

§ 1873. Now there will probably be found few persons in this or any other Christian country, who would deliberately contend that it was unreasonable, or unjust to foster and encourage the Christian religion generally, as a matter of sound policy, as well as of revealed truth. In fact, every American colony, from its foundation down to the revolution, with the exception of Rhode Island, (if, indeed, that state be an exception,) did openly by the whole course of its laws and institutions, support and sustain in some form the Christian religion; and almost invariably gave a peculiar sanction to some of its fundamental doctrines. And this has continued to be the case in some of the states down to the present period, without the slightest suspicion that it was against the principles of public law or republican liberty.[1] Indeed, in a republic, there would seem to be a peculiar propriety in viewing the Christian religion as the great basis, on which it must rest for its support and permanence, if it be what it has ever been deemed by its truest friends to be, the religion of liberty. Montesquieu has remarked, that the Christian religion is a stranger to mere despotic power. The mildness so frequently recommended in the gospel is incompatible with the despotic rage, with which a prince punishes his subjects, and exercises himself in cruelty.[2] He has gone even further, and affirmed that the protestant religion is far more congenial with the true spirit of political freedom than the Catholic. "When," says he, "the Christian religion, two centuries ago, became unhappily divided into Catholic and Protestant, the

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[1] 2 Kent's Comm. Lect. 34, p. 35 to 37; Rawle on Const. ch. 10, p. 121, 122.

[2] Montesq. Spirit of Laws, B. 24, ch. 3.

people of the north embraced the Protestant, and those of the south still adhere to the Catholic. The reason is plain. The people of the north have, and will ever have a spirit of liberty and independence, which the people of the south have not. And, therefore, a religion which has no visible head, is more agreeable to the independency of climate, than that which has one." [3] Without stopping to inquire whether this remark be well founded, it is certainly true, that the parent country has acted upon it with a severe and vigilant zeal; and in most of the colonies the same rigid jealously has been maintained almost down to our own times. Massachusetts, while she has promulgated in her BILL OF RIGHTS the importance and necessity of the public support of religion, and the worship of God, has authorized the legislature to require it only for Protestantism. The language of that bill of rights is remarkable for its pointed affirmation of the duty of government to support Christianity and the reasons for it. "As," says the third article, "the happiness of a people, and the good order and preservation of civil government essentially depend upon piety, religion, and morality, and as these cannot be generally diffused through the community, but by the institution of the public worship of God, and of public instructions in piety, religion, and morality; therefore, to promote their happiness and to secure the good order and preservation of their government, the people of this commonwealth have a right to invest their legislature with power to authorize, and require, and the legislature shall from time to time authorize and require the several towns, parishes, &c. &c. to make suitable provision at their own expense for the institution of the public worship of God, and for the support and maintenance of public *protestant* teachers of piety, religion, and morality, in all cases where such provision shall not be made voluntarily." Afterwards there follow provisions, prohibiting any superiority of one

[3] Montesq. Spirit of Laws, B. 24, ch. 5.

sect over another, and securing to all citizens the free exercise of religion.

§ 1874. Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration, the general, if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation if not universal indignation.[1]

§ 1875. It yet remains a problem to be solved in human affairs, whether any free government can be permanent, where the public worship of God, and the support of religion, constitute no part of the policy or duty of the state in any assignable shape. The future experience of Christendom, and chiefly of the American states, must settle this problem, as yet new in the history of the world, abundant as it has been in the experiments in the theory of government.

§ 1876. But the duty of supporting religion, and especially the Christian religion, is very different from the right to force the consciences of other men, or to punish them for worshipping God in the manner which they believe their accountability to him requires. It has been truly said, that "religion, or the duty we owe to our Creator, and the manner of discharging it, can be dictated only by reason and conviction, not by force or violence."[1] Mr. Locke himself, who did not doubt the right of government to interfere in matters of religion, and especially to encourage Christianity, at the same time has expressed his opinion of the right of private

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[1] See 2 Lloyd's Deb. 195, 196.

[1] Virginia Bill of Rights, 1 Tuck. Black. Comm. App. 296; 2 Tuck. Black. Comm. App. note G. p. 10, 11.

judgment and liberty of conscience, in a manner becoming his character, as a sincere friend of civil and religious liberty. "No man, or society of men," says he, "have any authority to impose their opinions or interpretations on any other, the meanest Christian; since, in matters of religion, every man must know, and believe, and give an account for himself."[2] The rights of conscience are, indeed, beyond the just reach of any human power. They are given by God, and cannot be encroached upon by human authority, without a criminal disobedience of the precepts of natural, as well as of revealed religion.

§ 1877. The real object of the amendment was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to a hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution, (the vice and pest of former ages,) and of the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age.[3] The history of the parent country had afforded the most solemn warnings and melancholy instructions on this head;[4] and even New England, the land of the persecuted puritans, as well as other colonies, where the Church of England had maintained its superiority, would furnish out a chapter, as full of the darkest bigotry and intolerance, as any, which could be found to disgrace the pages of foreign annals.[1] Apostasy, heresy, and nonconformity had been standard crimes for public appeals,

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[2] Lord King's Life of Locke, p. 373.

[3] 2 Lloyd's Debates, 195.

[4] Black. Comm. 41 to 59.

[1] *Ante*, vol. i. § 53, 72, 74.

to kindle the flames of persecution, and apologize for the most atrocious triumphs over innocence and virtue.[2]

§ 1878. Mr. Justice Blackstone, after having spoken with a manly freedom of the abuses in the Romish church respecting heresy; and, that Christianity had been deformed by the demon of persecution upon the continent, and that the island of Great Britain had not been *directly* free from the scourge,[3] defends the final enactments against non-conformity in England, in the following set phrases, to which, without any material change, might be justly applied his own sarcastic remarks upon the conduct of the Roman ecclesiastics in punishing heresy.[4] "For non-conformity to the worship of the church," (says he,) "there is much more to be pleaded than for the former, (that is, reviling the ordinances of the church,) being a matter of private conscience, to the

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[2] See 4 Black. Comm. 43 to 59.

[3] *"Entirely"!* Should he not have said, *never* free from the scourge, as more conformable to historical truth?

[4] 4 Black. Comm. 45, 46. His words are: It is true, that the sanctimonious hypocrisy of the Canonists went, at first, no further than enjoining penance, excommunication, and ecclesiastical deprivation for heresy, though afterwards they proceeded to imprisonment by the ordinary, and confiscation of goods *in pios usus*. But in the mean time they had prevailed upon the weakness of bigoted princes to make the civil power subservient to their purposes, by making heresy not only a temporal, but even a capital offence; the Romish Ecclesiastics determining, without appeal, whatever they pleased, to be heresy, and shifting off to the secular arm the odium and the drudgery of executions, with which they themselves were too tender and delicate to intermeddle. Nay, pretended to intercede, and pray in behalf of the convicted heretic, *ut citra mortis periculum sententia circum eum moderatur*, well knowing at the same time that they were delivering the unhappy victim to certain death." 4 Black. Comm. 45, 46. Yet the learned author, in the same breath, could calmly vindicate the outrageous oppressions of the Church of England upon Catholics and Dissenters with the unsuspecting satisfaction of a bigot.

scruples of which our *present* laws have shown a very just and Christian indulgence. For undoubtedly all persecution and oppression of weak consciences, on the score of religious persuasions, are highly unjustifiable upon every principle of natural reason, civil liberty, or sound religion. But care must be taken not to carry this indulgence into such extremes, as may endanger the national church. There is always a difference to be made between toleration and establishment."[1] Let it be remembered, that at the very moment, when the learned commentator was penning these cold remarks, the laws of England merely tolerated protestant dissenters in their public worship upon certain conditions, at once irritating and degrading; that the test and corporation acts excluded them from public and corporate offices, both of trust and profit; that the learned commentator avows, that the object of the test and corporation acts was to exclude them from office, in common with Turks, Jews, heretics, papists, and other sectaries;[2] that to deny the Trinity, however conscientiously disbelieved, was a public offense, punishable by fine and imprisonment; and that, in the rear of all these disabilities and grievances, came the long list of acts against papists, by which they were reduced to a state of political and religious slavery, and cut off from some of the dearest privileges of mankind.[3]

§ 1879. It was under a solemn consciousness of the dangers from ecclesiastical ambition, the bigotry of spiritual pride, and the intolerance of sects, thus exemplified

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[1] 4 Black. Comm. 51, 52.

[2] 1 Black. Comm. 58.

[3] 1 Black. Comm. 51 to 59. Mr. Tucker, in his Commentaries on Blackstone, has treated the whole subject in a manner of most marked contrast to that of Mr. J. Blackstone. His ardor is as strong, as the coolness of his adversary is humiliating, on the subject of religious liberty. 2 Tucker's Black. Comm. App. Note G. p. 3, &c. See also 4 Jefferson's Corresp. 103, 104; Jefferson's Notes on Virginia, 264 to 270; 1 Tuck. Black. Comm. App. 296.

in our domestic, as well as in foreign annals, that it was deemed advisable to exclude from the national government all power to act upon the subject.[4] The situation, too, of the different states equally proclaimed the policy, as well as the necessity of such an exclusion. In some of the states, episcopalians constituted the predominant sect; in others, presbyterians; in others, congregationalists; in others, quakers; and in others again, there was a close numerical rivalry among contending sects. It was impossible, that there should not arise perpetual strife and perpetual jealously on the subject of eccelesiastical ascendency, if the national government were left free to create a religious establishment. The only security was in extirpating the power. But this alone would have been an imperfect security, if it had not been followed up by a declaration of the right of the free exercise of religion, and a prohibition (as we have seen) of all religious tests. Thus, the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions; and the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship.[1]

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[4] 2 Lloyd's Debates, 195, 196, 197. "The sectarian spirit," said the late Dr. Currie, "is uniformly selfish, proud, and unfeeling." Edinburgh Review, April, 1832, p. 125.

[1] See 2 Kent's Comm. Lect. 24 (2d edition, p. 35 to 37); Rawle on Const. ch. 10, p. 121, 122; 2 Lloyd's Deb. 195. See also vol. i. § 622.

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Nos. 83-812 and 83-929

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

GEORGE C. WALLACE, Governor, *et al.*,
Appellants,

DOUGLAS T. SMITH, *et al.*,
Intervenors-Appellants,

v.

ISHMAEL JAFFREE, *et al.*,
Appellees.

BRIEF OF MORAL MAJORITY, INC. AS *AMICUS CURIAE*

On Appeal from the United States Court of Appeals for the Eleventh Circuit.

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INTEREST OF THE AMICUS CURIAE

Moral Majority, Inc., is a nationwide nonpartisan organization dedicated to the protection of religious liberty, human life, moral standards and traditional family values. It has chapters in forty-five states of the United States and a membership of approximately 4½ million Americans. Moral Majority, Inc., was founded in 1979 and is incorporated under Virginia law as a nonprofit charitable organization. Its principal address is 305 Sixth Street, Lynchburg, Virginia 24504.

Moral Majority strongly supports this statement of its founder, Dr. Jerry Falwell:

> "American leaders are rightly concerned about our overcrowded prisons, the rise of violent crime, the spread of drug abuse, and the rotting of the fabric of ethics in our society. So they call for more public spending, expanded social services, prison reform.
>
> "But when will they realize that a good society comes only from good people — people who feel bound by the moral principles given in the Bible and tied to recognition of God as our Creator and Judge? It is bad for our nation that we deny millions of children who attend our public school that recognition through a stated opportunity for them to pray.
>
> "From my personal experience, I know that my exposure to prayer in the public schools had a great and positive impact on me. It cultivated a character value that impressed on me the importance of respecting Divine authority as well as governmental authority. Polls constantly show that more than 75% of the American people want prayer back in school. Can those who oppose school prayer honestly say that our children are better off than we were twenty years ago? I have never met or heard of a child who was hurt by being exposed to voluntary school prayer. But I know of a nation that is very greatly hurt by banning it."

Moral Majority's interest in this case arises from the strong interest of its members in religious freedom. The statute challenged herein advances the enjoyment of a religious civil right.

SUMMARY OF ARGUMENT

The statutory allowance, in the public schools, of a period of time expressly set aside exclusively for meditating by children or their voluntarily engaging in prayer accommodates, within narrow tolerances, a religious need of children, the fulfilling of which is presently denied them. The reliance by the court below on various Establishment Clause decisions of the Supreme Court is misplaced, since application of those decisions in the premises would destroy, rather than protect, the enjoyment, by children, of First Amendment liberties. This case calls not only for weighing major Free Exercise considerations against trivial Establishment Clause claims but also for deciding whether a child's bare opportunity to minimally exercise theistic religious observance shall be subordinated to a preferred establishment of secularism.

ARGUMENT

Moral Majority considers that the provision in the challenged statute, which empowers the public school teacher to announce that a period of silence shall be observed "for . . . voluntary prayer" constitutes a recognition of theistic religion (since prayer is most commonly understood as an "address to God". WEBSTER'S NEW COLLEGIATE DICTIONARY, 869.).

Moral Majority recognizes, at the outset, that to speak of any official "recognition of theistic religion" appears to run contrary to holdings of this Court. But whether, therefore, the principle of *stare decisis* should at once operate to void the statute involves examination of four matters:

1. The reality that the American public school is today considered legally required to exclude theistic religion in any meaningful sense.

2. The fact that, for many believers, the exclusion of theistic religion from the central education experience and daily school environment of the child is an exclusion of the child from the enjoyment of a natural and basic liberty.

3. The reality that the religionless regime and environment, now officially imposed upon the publicly sponsored educational processes, constitutes a regime and environment of what is properly defined as secularism.

4. The fact that the decisions of this Court, in the cases held by the Court of Appeals to be here governing, should be held inapplicable to the case at hand.

I. Denial to Public School Children of the Minimal Recognition of Theistic Religion Afforded by the Statute Is a Denial to Them of the Free Exercise of Religion.

Children who attend school in all fifty states do so under compulsion of law. The typical school term covers

at least eight months of the year, for five days of the week, and for most of the daytime of each day. Thus the school is the predominant educational environment of the child and of commanding influence in the child's life.[1]

This Court has stressed the central role of schools in the life of the child — "educating the young for citizenship" (*West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637 (1943)); "a principal instrument in awakening the child to cultural values, . . . and in helping him to adjust normally to his environment." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). Providing public schools is said to rank "at the very apex of the function of a State" due to its "high responsibility for the education of its citizens." *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). A majority of American children (89%) attend public schools.[2]

While many individuals and organizations undoubtedly favor the exclusion of all forms of theistic religious observance from the public schools, and some others doubtless feel that those references to religion allowable in the schools under this Court's ruling in *Schempp*[3] make adequate provision for religion, there are many for whom the present public school relationship to religion is profoundly objectionable as denying their children religious freedom in any meaningful sense. In *Schempp*, the Court stated that it was not, by its ruling banning the

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1. Indeed, as has recently been stated, ". . . perhaps the school, now more comprehensive than the church in enrolling the young, is expected or at least permitted to do more of what home and church once did together in the spiritual realm. At any rate, in the [public] schools of our sample, from a low of 66% (in one of the high schools) to a high of 100% (in two elementary schools), parents we surveyed agreed rather strongly that 'it would be all right with me to allow prayers at this school'." J.I. Goodlad, A PLACE CALLED SCHOOL, 70.

2. *Digest of Educational Statistics*, 1983-1984. U.S. Department of Education, National Center For Educational Statistics (1984).

3. *Abington Township School District v. Schempp*, 374 U.S. 203, 225 (1963).

Bible-reading and Lord's Prayer practices there considered, establishing a "religion of secularism in the sense of affirmatively opposing or showing hostility to religion."[4] But it is obvious that what is left out of the program of a school, including its curriculum, may in itself be a positive teaching of the relative unimportance of the matter omitted, or perhaps even of its eccentricity. In any event, it certainly amounts to a teaching that man's relationship to God has not the stature or meaningfulness of everything else in the entire educational process and plainly is not essential to the formation of the whole person.[5] This, to the *amicus*, and to the parent intervenors herein, is seriously objectionable. They (and, to the knowledge of the *amicus*, a very large population of other Americans) consider that the total exclusion of religion, within the school day and on the school premises, is a serious deprivation to their children.

Against the foregoing, it is familiarly argued (a) that the Court in *Schempp* in no way barred the influence, upon the child, of home and church, but indeed emphasized the "exalted" place of religion in our society "through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind",[6] (b) and that, further, the Court stated:

> ". . . it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said

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4. *Id.* at 225.

5. As Sir Walter Moberly, chairman of the University Grants Committee of England, stated:

> "It is a fallacy to suppose that by omitting a subject you teach nothing about it. On the contrary you teach that it is to be omitted, and that it is therefore a matter of secondary importance. And you teach this not openly and explicitly, which would invite criticism; you simply take it for granted and thereby insinuate it silently, insidiously, and all but irresistibly. . . ." W. Moberly, THE CRISIS IN THE UNIVERSITY, 55-56.

6. *Schempp*, *supra*, at 225.

that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment." *Ibid.*

This argument, however, misses wide the active concern of many believers:

(a) The relegating of religion to home and church and the child's heart and mind is, for many believers, the relegating of religion to a weak, collateral role at best. The nature of religious exercise and belief were not closely considered by the Court in *Schempp* perhaps because no parties before it had sought to advance Free Exercise claims on behalf of the challenged practices. *Schempp* was simply not focused on important aspects of the question of "What is belief to the believer?" In the present case numerous intervenors have informed the Court that the challenged statute accommodates their religious need, in that it gives positive recognition to prayer, a "quintessential religious practice" (see *Jaffree v. Wallace*, 705 F.2d 1526, 1534 (1983)) and allows their children to participate in that practice as a practice publicly deemed worthy of recognition.[7] Religion, under the

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7. These intervenors labor under the burden described by Professor William D. Valente:

> "The political tension in public schools traces back to the nullification in the *McCollum* case of the option of public school parents to use their school buildings for private voluntary, religious instruction. The tension was heightened by the prayer and the Bible reading cases, which produced separate incommensurable constitutional tests for protection of free exercise of religion and for establishment of religion. Today, compulsion is required to establish a free exercise infringement, but not to show an establishment of religion; hence the protection of liberty is obviously stronger for those who oppose religiously offensive activity."

W. D. Valente, OVERVIEW OF CONSTITUTIONAL DEVELOPMENTS AFFECTING INDIVIDUAL AND PARENTAL LIBERTY INTERESTS IN ELEMENTARY AND SECONDARY EDUCATION, 1-2 (1979).

Alabama statute, is no longer "abnormalized" but treated as natural to the general learning environment of the child.

(b) The Court in *Schempp* substituted its own *religious* judgment that the omission of religious practice would be sufficiently made up for by installing courses in comparative religion, or study of the Bible for its literary and historic qualities, or teaching religion if "presented objectively as part of a secular program of education."[8] This prescription has been totally unacceptable to those many believers who do not conceive of religion as a secular matter, who consider the Bible as the Word of God, and who abhor comparative religion as destructive of belief. What is, for many parents, the *real thing* — religious observance — cannot presently be had in the public school where the child, at the most sensitive stage of being, spends most of his learning years, most of his days, and most of his vital hours in each day.

Whether there remain, nevertheless, sufficient reasons for the exclusion of every vestige of religion (in the real sense) from the public schools, undeniable are the facts that millions of children in the United States are compelled to attend public school (by virtue of the compulsory attendance laws, by economic circumstances or by parental preference) and that none may presently exercise liberty of religious observance within those schools.[9]

Twenty one years ago Justice Stewart, dissenting in *Schempp*, clearly exposed the falsity of the Court's elaborate but flawed rationale in *Schempp*:

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8. This judgment was based upon no evidence in the record, nor any reference to expert religious or psychological opinion.

9. Irrelevant would be an attempted rejoinder that if parents want a religious education for their children, they are free to send them to sectarian schools. Many parents cannot afford to do so or no such schools exist where they are. More importantly, however: if a parent exercises his liberty to choose public education, he should not be forced to accept it only on the condition that it be religionless.

> "With all its surface persuasiveness, however, this argument seriously misconceives the basic constitutional justification for permitting the exercises at issue in these cases. For a compulsory state educational system so structures a child's life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. Viewed in this light, permission of such exercises for those who want them is necessary if the schools are truly to be neutral in the matter of religion. And a refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or at the least, as government support of the beliefs of those who think that religious exercises should be conducted only in private." *Schempp, supra,* at 313.

Over twenty years of experience under *Schempp* have brought home the wisdom of this warning by Justice Stewart.

II. Denial to Public School Children of the Benefits of the Challenged Statute is Not Required by the Establishment Clause.

The court below, the appellees, and their supporting *amici* all contend that the challenged statute's express provision for the opportunity to pray constitutes an establishment of religion forbidden by the Establishment Clause of the First Amendment. They must acknowledge, however, the obvious fact that the Supreme Court has *not* passed upon the two First Amendment questions here presented pertaining to religious liberty and to non-establishment. Their necessary contention is that the Ccurt's decisions in cases of the past — *McCollum*[10], *Engel* [11] and *Schempp* — are so completely in point and

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10. *McCollum v. Board of Education*, 333 U.S. 204 (1948).
11. *Engel v. Vitale*, 370 U.S. 421 (1962).

so persuasive in rationale that they dictate the striking down of the Alabama law. While none of the three cases is factually in point, they require re-examination in light of the realities relating to the present statute and case as these pertain to genuine religious freedom.

All three decisions were responsive to suits brought by parents to rid the public schools of theistic religious practices. They were three decisions favoring *some* parents. They in fact denied parental rights to many other parents.

McCollum represented a devastating and historic blow to parental liberties — and to community consensus, pluralism and religious liberty. In the year the case was started, the School District of Champaign, Illinois, had, with great labor, brought into being a plan which it deemed to be a beneficent device for the accommodation, within the public schools, of the religious liberty of children (and relatedly of their parents). Apparently not considering that it might be taking a first step toward rendering the public schools, not religiously "neutral", but religiously secularist, the Court voided the plan. The plan was the product of deliberations by a council made up of interested Jews, Catholics and Protestants. Under the plan, the local board of education permitted weekly classes in religious instruction to take place on public school premises in grades four through nine. No child was required to participate. No expense to the School District was involved, the instructors being the employees of the interreligious council. The parent initiated the child's participation through signing a card requesting the instruction. The instructors were subject to approval by the superintendent of schools, this apparently to insure that persons promising harm to children or disruption of the regimen of the school could be kept out. The evidence established that this provision had never been employed to deny access to any religion's representative. It was further found by the trial court that the religious education classes (with which, by the time of trial, there had been five years experience) had not been promotive

of sectarian differences, but had in fact "fostered tolerance rather than intolerance".[12] As against the acceptance and support of the program by a majority of the parents, one parent, Mrs. Vashti McCollum, who described herself as a "rationalist", sought to end the program. In the Supreme Court she prevailed.[13] The bases for the Court's decision become interesting to reexamine in 1984, when the cumulative effect of decades of parental frustration over denial of religious liberty for children in public schools has apparently reached an explosive pitch.

The Court's opinion (by Justice Black) was erected upon the sands of Justice Black's *Everson* opinion[14] — his imaginative (and historically inaccurate) picture of the meaning of the Establishment Clause. The Court's point was that the use made of "tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council" violated the principle of absolute church-state separation. The Court ignored all facts contained in the trial record which showed how salutary the program was in accommodating the liberties of students and parents, or how the program offended no one except the pressure groups which had helped convoy Mrs. McCollum to her victory. While the lady's interest in obliterating the program appeared to be less that of a parent than that of a "rationalist", the interests of all the other parents did not

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12. From the trial court findings as quoted in dissenting opinion of Justice Reed, *McCollum, supra*, at 243, n. 6.

13. She prevailed although she had failed to allege any violation of the federal Constitution. The Supreme Court said that the fact that the Illinois courts had dealt with such question sufficed.

14. *Everson v. Board of Education*, 330 U.S. 1 (1947), wherein Justice Hugo Black, in dictum, speaking for the Court, devised a view of the Establishment Clause, completely unknown to history, whereby the Clause was seen to bar Government from the support of "any religious activities" (*id.*, at 15-16) apparently without regard to any consequence to the consciences of those tax-paying parents and their children who could not accept a sterilely irreligious learning environment for their children.

intrude upon the Court's thinking. Not once in the opinion of the Court appears a single line devoted to *their* equities. Justice Felix Frankfurter penned a long concurrence likewise expressing no concern for them, but going on to say how children who did not participate in the program would be harmed. Evidence of those dreadfuls, however, was nowhere to be found in the record. No parent or child, victimized by the program, had given evidence at the trial of any trauma the program caused. The harm was indeed of a more incorporeal sort: harm to a *principle* — *i.e.*, to a narrow philosophic prejudice insistent that *its* values be imposed as superior to any parental rights or children's liberties.

Thus the Court destroyed a socially valuable community agreement which, over years, had been painstakingly developed. An important value of the program lay in its encouraging religious pluralism — a value later said in Court opinions to be important.[15] The greater damage, however, was the damage to the proper interests of religious parents; furthermore the Court had now set the stage for the total establishment of secularism in the public schools which would be accomplished fifteen years later.

Engel v. Vitale was an action by the parents of public school pupils to bar use, in their school, of a prayer[16] composed by a governmental body, the New York Board of Regents. The prayer was to be recited aloud; no pupil was to be compelled to participate if his or her parents objected. School authorities were forbidden to comment upon nonparticipation of any student, students being permitted to remain silent or to be excused entirely from the exercise. The parents who sued included "members of the Jewish faith, of the Society For Ethical Culture, of the Unitarian Church, and one non-believer."[17] They

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15. *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971)

16. "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

17. *Engel v. Vitale*, 191 N.Y.S. 2d 453, 467 (1959)

claimed that the prayer practice violated the Establishment Clause of the First Amendment. After the case was underway other parents intervened, claiming that to ban the practice violated rights of theirs' protected by the Free Exercise Clause of the same amendment. The Supreme Court held the program to be void as an establishment of religion, and what is remarkable about its opinion is its reliance upon irrelevant history and its complete failure even to mention the asserted parental rights of the intervening parents. The historical props by which the Court, in lengthy footnotes, sought to support its opinion ranged from the Inquisition through the depredations upon religion of Mary Tudor and Elizabeth I, the persecutions of John Bunyan and Roger Williams and the Virginia assessments against which Madison had inveighed. The Court summarized its key point: ". . . the historical fact that governmentally established religions and religious persecution go hand in hand."[18] In other words, the 24-word prayer — in spite of the procedural safeguards which had been attached to its use — set the stage for religious persecution in New York. In fact there existed no credible connection whatever between the prayer program and the dreadful historical episodes with which the footnotes were threaded. And this historical overstatement sufficed to render any discussion of the religious liberties of the intervenors unnecessary. Thus was ignored a wise earlier admonition of the New York Court of Appeals (which had upheld the prayer program). It had quoted a statement of a Mr. Spencer, the State Superintendent of Schools in 1839:

> "*Both* parties have rights; the one to bring up their children in the practice of publicly thanking the Creator for his protection and invoking his blessing; the other of declining on behalf of their children, the religious services of any person in

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18. *Engel v. Vitale*, 370 U.S. 421, 432 (1961).

> whose creed they may not concur, or for other reasons satisfactory to themselves."[19]

The Regents Prayer Case caused a national storm of criticism — characterized by supporters of the decision as a mere "intemperate outburst" but in fact expressing a widespread and profound anxiety over the ultimate significance of the decision. The Supreme Court, with but one dissent (that of Justice Stewart), had banned the prayer because it was religious. The Court's words were:

> ". . . the State of New York has adopted a practice wholly inconsistent with the Establishment Clause. There can, of course, be no doubt that New York's program of daily invocation of God's blessings as prescribed in the Regents' prayer is a *religious activity*."[20]

The country read the matter rightly. "Religious activity" — *any* religious activity — was now purged from the schools which most children attend. There followed, next term, a third in the trilogy of cases relating to religion in the public schools — and hence vitally affecting religious liberty in education. The Supreme Court's decision in that case has been hailed as an historic balancing of interests in religious liberty as against the public interest in non-establishment of religion in the schools. Unfortunately, it is not. Rather it appeared to serve as an elaborate attempt of the Court to defuse the intense controversy which had followed its *Engel* decision. The case, *Schempp, supra,* was actually a pair of cases — the Lord's Prayer case from Maryland and the Bible-reading case from Pennsylvania.

The plaintiffs in the Pennsylvania case were Unitarian parents and their children; those in the Maryland case were Madalyn Murray and her son, both professed atheists. No parents favoring the practices were parties in these litigations. The true impact of *Schempp* has

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19. *Engel v. Vitale*, 206 N.Y.S. 2d 183, 192 (1961).

20. *Engel v. Vitale*, 370 U.S. 421, 424 (1962). (Emphasis supplied).

been discussed *supra* at pp. 4-8. It has militated against, and not for, religious civil rights.

The *amicus* therefore submits (a) that no past decision of this Court actually governs the case at hand, (b) that the *McCollum*, *Engel* and *Schempp* decisions rest upon untenable bases which should not further be advanced to limit religious freedom, and (c) that no religious claim should be disqualified merely because it is the claim of a majority; the high percent of Americans favoring the opportunity for prayer in the public schools is, after all, but a population of individuals. Each asserts his or her own religious right as a minority of one.

III. The Exclusion of Religious Observances From the Public Schools Results, Not in "Neutrality", But in a Religious Preference: a Tax-Supported Secularism.

The *amicus* does not believe that the Supreme Court of the United States, in the *McCollum*, *Engel* and *Schempp* decisions, intended imposing secularism upon American children. The Court instead appeared deeply conscious of the evils of subjecting any religious or nonreligious minority of children to embarrassment, isolation, "odd ball" status, pressures to conform and, certainly, to proselytizing. Moral Majority believes the Court was right in its concern (which Moral Majority deeply shares), but wrong in its solution. No evidence is found in the present record that any child will suffer any of the foregoing disabilities because other children's liberties are recognized. The fact is undeniable that the result of the Court's decisions has been to bring the public schools to the regime of secularism foreseen by Justice Stewart.

Absolutely accurate is a more recent comment by a Justice of this Court:

> "There can be little doubt that to the extent secular education provides answers to important moral questions without reference to religion or teaches that there are no answers, a person in one sense

sacrifices his religious belief by attending secular schools." *Thomas v. Review Board*, 450 U.S. 707, 724 (n. 2) (1982). Rehnquist, J., dissenting.

The public school either "provides answers to important moral questions" or, in the alternative, teaches that there are no answers. Inevitably it does these, because it has children in its keeping — with their questions, probings, problems, varieties of conduct, and personal crises. Further, there is widespread belief among public educators that the public school has the *duty* to guide children, not only through "cognitive" education, but through "affective" education — that is to mold them for what is deemed (by some standard or other — but not a theistically religious standard) for "good" citizenship, for "successful" interpersonal relationships, for "health" (including sexually related maters). Not lacking in these prescriptions are concepts of what a "good" social order should consist, of how "understanding" may be achieved among nations.

Typical of these programs are those afforded by Michigan. The Michigan State Board of Education, in THE COMMON GOALS OF MICHIGAN EDUCATION (1980), stresses "attitudes" which students should achieve (*id.* at 5). The "attitudes" include "moral values needed for participation in a democratic society" (*id.*, at 6), "attitudes necessary for responsible family membership" (*id.* at 9), etc. The Michigan Department of Education has issued GUIDELINES FOR GLOBAL EDUCATION (1978), and SEX EDUCATION GUIDELINES, INCLUDING REPRODUCTIVE HEALTH AND FAMILY PLANNING (1978). These abound with value-related subtopics.

This widespread kind of programming is mentioned, not to deny that schools may teach values, but to point out that, in our public schools today, *all* of these programs must be presented *without* traditional Judeo-Christian value judgments and are presented *with* nontheistic value judgments. They thus constitute what is known as Secular Humanism. Secular Humanism is a

religion.[21] It now is awarded a legally preferred status and is supported by taxes extracted from all taxpayers.

Appellants in this case have raised no challenge to any particular public school educational program on Establishment Clause grounds related to the official preference now given for the religion of Secular Humanism. Rather, the existence of preference highlights the propriety, value and need for a degree of constitutional balancing with respect to the public school in order to accommodate the religious aspirations of many students who today are officially disfavored.

Against this, it will of course be argued that once the "entering wedge" of the contested statute is held valid, the stage will have been set for expansion — with the prospect of opening up religious conflicts and spreading divisiveness. Such concerns ought not be countenanced when employed as bugaboos (as sometimes they are) to suppress religious liberty. The position of the *amicus* comes simply to this:

> a. Religious liberty is denied to many children in our public schools today, and secularism imposed, by virtue of past Supreme Court rulings.
>
> b. The statute in question affords a significant accommodation to the freedom of those children.

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21. This Court has long since held Secular Humanism along with Ethical Culture, to be a "*religion*" within the meaning of the First Amendment. *Torcaso v. Watkins*, 367 U.S. 488, 495, n. 11 (1961). While this appeared to have been in a Free Exercise context, it is clear that Secular Humanism is a "religion" whose establishment is barred by the Establishment Clause. As Justice Rutledge, dissenting in *Everson*, stated:

> " 'Religion' appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid 'an establishment' and another, much broader, for securing 'the free exercise thereof'." *Everson, supra*, at 32.

Secular Humanism claims itself to be a religion in the legal sense (see HUMANIST MANIFESTOS I and II, 1-10) and the religion which should pervade and control society. Ibid., passim.

c. No tangible injury-in-fact will come to other children. Indeed all children will benefit from the knowledge that all are fairly served.[22]

The safeguards given Americans by the Religion Clauses of the First Amendment are of absolute importance. But the clauses are not absolutes, as the Court has lately repeatedly stressed. The rigid application of the Establishment Clause to bar recent generations of children from the enjoyment of religious liberty has been an unfortunate example of constitutional absolutism. The wisdom of this Court has generally worked toward balance, the fair and sensible mean, as opposed to the perfectionist ideological extreme. This is plainly what the Court will rest upon here in upholding the statute for the benefit of religiously disadvantaged children.

CONCLUSION

For all of the foregoing reasons, the *amicus curiae* respectfully urges that the judgment below be reversed.

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22. Nor, obviously , would the Court's upholding of the statute provide the slightest ground for departing from its prior rulings barring subsidy to religious institutions.

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Nos. 83-812
83-929

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

GEORGE C. WALLACE, et al.,
Appellants

v.

ISHMAEL JAFFREE, et al.

BRIEF OF THE STATES' ATTORNEYS GENERAL AS AMICI CURIAE IN SUPPORT OF APPELLANTS

On Appeal from the United States Court of Appeals for the Eleventh Circuit.

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INTEREST OF THE AMICI CURIAE

The State of Delaware, by and through its Attorney General and the States of Arizona, Indiana, Louisiana, Oklahoma and Virginia, by and through their Attorneys General, respectfully present this brief as *amici curiae* in support of Appellants in this case.

In 1975, the Delaware legislature enacted a statute requiring public schools to set aside two or three minutes at the beginning of the school day for voluntary participation in "moral, philosophical, patriotic or religious activity." Del. Code Ann. tit. 14, §4101(b) (1975).

The Attorney General of Delaware in 1979 issued an Opinion construing this statute to be constitutional only insofar as it authorized silent prayer and other, non-religious, activities. Op. Del. Att'y. Gen. 79-I011 (App. hereto). Since 1979, public schools in Delaware have conducted a brief period of silence at the beginning of each school day. The States of Arizona, Indiana, Louisiana and Virginia each have statutes which require or allow public schools to conduct a short moment of silence for meditation and prayer, or meditation alone. Thus, the states have a substantial interest in this matter.

STATUTES INVOLVED

ALABAMA

Ala. Code §16-1-20.1 (1981):

At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.

ARIZONA

Ariz. Rev. Stat. Ann. §15-222 (1981):

At the commencement of the first class of the day in the schools the teacher in charge of the room in which the first class is held shall announce that a period of silence not to exceed one minute in duration will be observed for meditation, and during that time no activities shall take place and silence shall be maintained.

DELAWARE

Del. Code. Ann. Tit. 14 §1401(b) (1975) as amended 1978)

During the initial period of study on each school day all students in the public schools of Delaware shall be granted 2 or 3 minutes to voluntarily participate in moral, philosophical, patriotic or religious activity. For purposes of this section, "religious activity" shall include voluntary prayer at the beginning of each school day.

INDIANA

Ind. Code §20-10.1-7-11 (1976)

In each public school classroom, at the opening of each school day the teacher in charge may or, if directed by his governing body, shall conduct a brief period of silent prayer or meditation with the participation of all students assembled. This silent prayer or meditation is not a religious service or exercise and may not be conducted as one, but is an opportunity for silent prayer or meditation on a religious theme for those so inclined or a moment of silent reflection on the anticipated activities of the day.

LOUISIANA

La. Rev. Stat. Ann. 17:2115(A) (1980)

Each parish and city school board in the state shall permit the proper school authorities of each school within its jurisdiction to allow an opportunity, at the start of each school day, for those students and teachers desiring to do so to observe a brief time in silent meditation, which shall not exceed five minutes. The brief time of silent meditation shall not be intended or identified as a religious exercise.

VIRGINIA

Va. Code §22.1-203 (1980)

In order that the right of every pupil to the free exercise of religion be guaranteed within the schools and that the freedom of each individual pupil be subject to the least possible pressure from the State either to engage in, or to refrain from, religious observation on school grounds, the school board of each school division is authorized to establish the daily observance of one minute of silence in each classroom of the division.

Where such one-minute period of silence is instituted, the teacher responsible for each classroom shall take care that all pupils remain seated and silent and make no distracting display to the end that each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice.

SUMMARY OF THE ARGUMENT

Statutes which designate a few moments at the beginning of the school day to be used by public school children for silent meditation or prayer comport with the Establishment Clause of the First Amendment, both as this Court has applied that Clause and as the Framers of the First Amendment intended it to be applied.

A moment of silence accommodates those students whose faith urges them to begin the school day with prayer, as well as those who prefer to meditate, think or doze. It is entirely free of the coercion inherent in the spoken prayer and Bible reading invalidated in *Engel v. Vitale*, 370 U.S. 421 (1962) and *Abington School District v. Schempp*, 374 U.S. 203 (1963).

Justice Brennan's concurring opinion in *Schempp* suggested that a moment of silence is a permissible exercise. Plaintiffs in *Schempp* and *Engel*, who sought invalidation of spoken prayer, expressly conceded the constitutionality of a moment of silence; lower courts and scholars have agreed, although not without dissent.

Under the traditional three-pronged Establishment Clause analysis as restated in *Lynch v. Donnelly*, _____ U.S. _____, 104 S. Ct. 1355, (1984), moments of silence neither establish nor tend to establish a religion or religious faith. In reality, silent moments are by nature entirely non-coercive, respecting equally the rights of children of all beliefs.

The statutes facially reflect both the religious purpose of accommodating silent prayer and the secular purposes of accommodating quiet meditation or reflection. Since legislation will be held valid unless there is "no question that the statute was motivated wholly by religious considerations," *Lynch*, 104 S.Ct. at 1362, this neutral legislative intent is more than sufficient to satisfy the purpose prong of the tripartite test.

The arguments purporting to demonstrate that moments of silence advance religion exhibit a hypersensi-

tivity far beyond the *Lynch* test of whether a state activity "in reality . . . establishes a religion or religious faith or tends to do so." *Lynch*, 104 S.Ct. at 1361. Challengers assert that the teacher's exercise of her basic authority to require students to sit still and be quiet advances prayer because there is a danger that the students may misinterpret such instructions as requiring them to pray, or even to pray in a certain way, contrary to their own beliefs.

Yet there is no more danger of misinterpretation in this case than in a city's inclusion of a traditional Christian creche in a public Christmas display, or in a state's employment of a chaplain to lead prayer in the legislature or in closing schools and businesses on Sundays and holidays to facilitate group worship. Any concerns about the special susceptibility of children to undue influence are absent in a moment of silence by which a child is free to pursue his thoughts in private, without intrusion from teachers or fellow students. The "advancement" of religion in all these situations is so tenuous that none in reality poses any likelihood of establishing or tending to establish religion.

Nor do moments of silence require the state to become entangled in religious matters. No funds need to be allotted, there is no need for state interference in religious institutions and no threat is posed to normal political process through the use of moments of silence.

History demonstrates that the Framers of the First Amendment intended the federal government to have the power to designate certain times as appropriate for general voluntary prayer. The Framers approved the practice of declaring days of thanksgiving and general prayer. Such days are analogous to moments of silence in that they are entirely voluntary and do not endorse any particular form of worship. They differ from moments of silence in that they set aside an entire day, not just a few minutes, during which children and adults alike are released from the normal routine so that they

may pray if they choose. Certainly, since the Framers wished the government to be able to proclaim days of general thanksgiving, they also would have intended the government to be able to set aside a few moments for voluntary, silent prayer or meditation.

Jefferson and Madison fought to preserve religious freedom, not to abolish it. Both men encouraged moral behavior and the practice of religion according to the dictates of conscience.

Although religious history in the United States reveals some inconsistencies, that history shows an overwhelming commitment to religious freedom and toleration. A moment of silence exemplifies those ideals by permitting students to formulate and retain their private thoughts.

United States citizens regularly set aside moments, even days, to commemorate, reflect or relax. Those occasions range from the solemn and significant, such as Memorial Day or Independence Day, to the lighter respite of the "seventh inning stretch" at a baseball game.

Youths already coping with child-size annoyances such as the rush to school and the chaos of the playground live in an increasingly stressful environment. A moment of silence is a healthy pause in life's daily race. It is a proper exercise of the states' police power to require a moment of quiet during a school child's day so long as the child is free to use that moment as he pleases.

Finally, the moment of silence preserves our most cherished sense of privacy: the freedom to formulate and to keep to ourselves our innermost thoughts and dreams.

ARGUMENT

I. A MOMENT OF SILENCE FOR MEDITATION OR PRAYER AT THE BEGINNING OF THE SCHOOL DAY IN PUBLIC SCHOOL CLASSROOMS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

A. *INTRODUCTION*

The moment of silence statutes have been challenged by appellees, by the American Civil Liberties Union and the American Jewish Congress as *amici curiae*, and by challengers in similar cases as violative of the First Amendment. *Amici* claim in their brief in support of Appellees' Motion to Dismiss or Affirm as 35-37 that sitting and standing violate a child's constitutional rights because these postures reflect one traditional form of prayer.[1] In *May v. Cooperman*, 572 F.Supp. 1561 (1983), *appeal docketed*, Nos. 83-5890 (3d Cir. Dec. 10, 1983), 84-5126 (3d Cir. Feb. 28, 1984), a seventeen-year old student, after discussion with his family, concluded that sitting still in class during the moment of silence violated his rights and the student asked to leave. While waiting outside the school office for a determination of whether he could be excused from sitting in his classroom during the moment of silence, the student was directed by another teacher to stand still and be quiet. The student refused to do so, claiming that standing quietly in the school hallway was forcing him to pray. 572 F.Supp at 1567. The student and his parent sued.

Thus, opponents of a moment of silence, invoking the intent of the Framers of the Constitution and this Court's decisions, claim a constitutional right to refuse to sit still and be quiet in the classroom or in a hallway

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1. *Amici*, citing no authorities, claim that Catholics must kneel to pray and Jews must raise their hands above their heads and that these groups, among others, are deprived of the ability to pray. *Id.*

and at least one judge has found the everyday acts of sitting and standing to violate the First Amendment. It is respectfully submitted that such claims stray far beyond what the Framers or this Court ever intended.

B. *A HOLDING THAT MOMENTS OF SILENCE ARE CONSTITUTIONAL IS CONSISTENT WITH THIS COURT'S HOLDINGS IN THE SPOKEN PRAYER CASES*

The constitutional perimeters of opening exercises in public schools initially were drawn over two decades ago by this Court. *Engel v. Vitale*, 370 U.S. 421 (1962), forbade the use of a state-sponsored, spoken prayer in the New York public school system. One year later, *Abington School District v. Schempp*, 374 U.S. 203 (1963), held that the broadcast of Bible readings and the Lord's Prayer into public school classrooms with class recitation also violated the Constitution.

Nothing in those cases, however, precludes a moment of silence in public schools for silent meditation or prayer. The decisions invalidated state establishment of one particular form of religious exercise, a uniform spoken prayer. The decisions did not mandate hostility against all religion:

> [The First Amendment] requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

Everson v. Board of Education, 330 U.S. 1, 18 (1947) *quoted in Abington School District v. Schempp*, 374 U.S. at 218.

Schempp further noted:

> We agree of course that the State may not establish a "religion of secularism" in the sense of af-

> firmatively opposing or showing hostility to religion, thus "preferring those who believe in no religion over those who do believe."

Id. at 225, *quoting Zorach v. Clauson* 343 U.S. 306, 314 (1952).

A moment of silence is the embodiment of the neutral course charted in *Everson*, *Schempp* and *Engel*. It rests in the delicate balance between the Establishment and Free Exercise clauses of the First Amendment. It accommodates both religion and non-religion while avoiding hostility toward either believers or non-believers. It places no pressure on anyone to compromise his beliefs.[2]

Justice Brennan's *Schempp* concurrence proposed a moment of silence as a non-religious means to serve the secular ends of "fostering harmony among the pupils, enhancing the authority of the teacher, and inspiring better discipline:"[3]

> It has not been shown that . . . the observance of a moment of reverent silence at the opening of class, may not adequately serve the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government.[4]

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2. Such a moment also harmonizes with the spontaneous remark of Justice Black after announcing his majority opinion in *Engel* on June 25, 1962, that "the prayer of each man must be his own." G. Dunne, *Hugo Black and the Judicial Revolution* at 370 (1977).

3. *Schempp*, 374 U.S. at 280 (Brennan, J., concurring). That discipline has deteriorated to the point where students cloak themselves in the First Amendment to defy a teacher's reasonable request that the student wait quietly in a hallway.

4. *Id.* For further support of the constitutionality and usefulness of the moment of silence suggestion, Justice Brennan cited several sources, including an editorial in the Washington Post urging "a quiet moment that would still the tumult of the playground

Justice Brennan's concurrence was not the only time that a moment of silence was distinguished from spoken prayer in the *Schempp* and *Engel* proceedings. In the *Engel* oral arguments, William J. Butler, Esquire, representing the petitioners, argued for invalidation of the New York Regents' Prayer. The Court posed the following to Mr. Butler:

> THE COURT: Suppose instead of reading the version of any one of these Bibles, there's a provision for five minutes of silence, silent meditation?
> MR. BUTLER: Did you add the word "meditation," Mr. Justice?
> THE COURT: Of silence, for purposes of meditation.
> MR. BUTLER: I can't — I would say that that is not — I don't see any argument for its unconstitutionality.
> THE COURT: That wouldn't bother you? That would not bother you?
> MR. BUTLER: Not as you state it, Your Honor . . .[5]

In *Schempp*, the moment of silence issue was again raised in oral arguments. Leonard J. Kerpelman, Esquire, representing petitioners William J. Murray, III, and Madelyn E. Murray,[6] sought invalidation of the reading of the Bible and the Lord's Prayer in public school opening exercises. The following discussion ensued:

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and start a day of study," Washington Post, June 28, 1962 §A at 22 col. 2, a New York Times article reporting the opinion of the New York Commissioner of Education that silent prayer is constitutional, N.Y. Times, Aug. 30, 1962, §1 at 18, Col. 2, and Choper, *Religion in the Public Schools: a Proposed Constitutional Standard*, 47 Minn. L. Rev. 329, 370-371 (1963). *Id.* at 281, n. 57.

5. 56 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 1039-1040 (Kurland and Casper ed. 1975).

6. In *Murray v. Curlett*, No. 119 (consolidated with *Schempp*, 374 U.S. 203).

THE COURT: I suppose there's no earthly way that the law could enforce a prohibition against a man thinking and praying silently to himself, is there?
MR. KERPELMAN: No question about it, Your Honor. Thoughts come to men unbidden; prayers come to men unbidden. A man sends them to his Maker frequently as a prayer when they come to him. No one, certainly, can — prayer itself cannot be unconstitutional.[7]

Later, the Court asked Mr. Kerpelman directly:

THE COURT: Would your argument be the same if a Quaker pattern was followed and all students requested to remain silent for a minute or two minutes or three minutes?
MR. KERPELMAN: Your Honor, a question which is perhaps involved is a question of standing. Now, as I understand it, standing —
THE COURT: That wasn't my question.
MR. KERPELMAN: Well, I was going to say this, Your Honor, the Quaker ceremony would, it seems to me, be constitutional because it could — I don't see how it could possibly cause anyone any detriment. He does not have to stand up and profess a belief or disbelief in any religion.
THE COURT: Your client could stand there and think about his disbelief in God.
MR. KERPELMAN: Yes, he could, Mr. Stewart, Mr. Justice. And I do not think that that would be unconstitutional.[8]

Thus, even the vigorous and able opponents of spoken prayer in *Engel* and *Schempp* conceded the constitutionality of a moment of silence.

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7. 57 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 964 (Kurland and Casper, ed. 1975).

8. *Id.* at 1000-1001.

Several lower courts have found that the moment of silence concept fits within the constitutional boundaries drawn in *Engel* and *Schempp*. *See Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976) (upholding a minute of silence for meditation or prayer); *Reed v. Van Hoven*, 237 F. Supp. 48 (W.D. Mich. 1965) (permitting a few moments of silence for private meditation and silent prayer before lunchtime); *Opinion of the Justices*, 113 N.H. 297, 307 A.2d 558 (1973) (upholding voluntary silent meditation).[9]

In addition to the sources which Justice Brennan listed in support of a moment of silence in his *Schempp* concurrence, 374 U.S. at 282 n. 57, many other scholars and authorities have since expressed their belief that a moment of silence in public schools would be constitutional. Professor Tribe opines that because of its arguably non-religious nature, "even a statute *requiring* observance of a brief period of silence or meditation at the opening of the school day would not violate the establishment clause." L. Tribe, *American Constitutional Law* §14-6, 829 (1978) (emphasis in text).

Similarly, Professor Freund has stated: "Nor does any decision, in my judgment, prevent a public school class from engaging in a moment of silent meditation or reverence, as the teachings of the individual spirit or inheritance may prompt." P. Freund, *The Legal Issue*, in P. Freund & R. Ulich, *Religion in the Public Schools* 23 (1965).[10]

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9. *But see May v. Cooperman*, 572 F. Supp. 1561 (D.N.J. 1983); *appeal docketed*, Nos. 83-5890 (3d Cir. Dec. 16, 1983); 84-5126 (3d Cir. Feb. 28, 1984); *Duffy v. Las Cruces Public Schools*, 557 F. Supp. 1013 (D.N.M. 1983); *Beck v. McElrath*, 548 F. Supp. 1161 (D. Tenn. 1982), *appeal dismissed, vacated, remanded, Beck v. Alexander*, 718 F.2d 1098 (1983); *Opinion of the Justices to the House of Representatives*, 387 Mass. 1201, 440 N.E.2d 1159 (1982).

10. *Accord*, Kauper, *Prayer, Public Schools and the Supreme Court*, 61 Mich. L.Rev. 1031, 1041 (1963). *See also* Comment, *Ac-*

The following analysis demonstrates that a moment of silence satisfies the First Amendment tests established by this Court.

C. *MOMENTS OF SILENCE, IN REALITY, NEITHER ESTABLISH, NOR TEND TO ESTABLISH A RELIGION OR RELIGIOUS FAITH*

This Court recently stressed that it has never adopted the *Lemon v. Kurtzman* test as the single correct approach in Establishment questions.[11] *Lynch v. Donnelly*, ____ U.S. ____, 104 S.Ct. 1355, 1362 (1984). Rather, this test is only one tool which the Court may use "to determine whether, in reality [the challenged state action] establishes a religion or religious faith, or tends to do so." *Id.* at 1361. However, even application of the traditional three-pronged test in this case demonstrates that, in reality, the statutory authorization of a moment of silence for prayer or meditation neither establishes, nor tends to establish a religion or religious faith.

1. *Secular Purpose*

The Eleventh Circuit held that the objective of Alabama's moment of silence statute was "the advancement

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commodating Religion in the Public Schools, 59 Neb. L.Rev. 425, 450-454 (1980) (moment of silence could be utilized as direct substitute for practices struck down in *Engel* and *Abington*); Note, *Religion and the Public Schools*, 20 Vand. L. Rev. 1078, 1092-1093 (1967) (period of silence at opening of school day or at lunchtime permissible accommodation); Op. Tenn. Att'y Gen. No. 82-153 (1982); Op. Del. Att'y Gen. No. 79-I011 (1979) (App. 1).

11. *Lemon v. Kurtzman*, 403 U.S. 602 (1971) enunciated "three criteria" to be considered in Establishment claims: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Lemon*, 403 U.S. at 612-613 (citations omitted).

of religion" and that therefore the statute lacked secular purpose. *Jaffree v. Wallace*, 705 F.2d 1526, 1535 (11th Cir. 1983). The Court of Appeals based this conclusion on testimony in the District Court that one Alabama senator's purpose in sponsoring the legislation had been to return voluntary prayer to public schools. *Jaffree by and through Jaffree v. James*, 544 F. Supp. 727, 731 (S.D. Ala. 1982), *vacated* 554 F. Supp. 1130 (S.D. Ala. 1983).

Lynch stated that legislation is valid under the purpose prong of the three-part test unless there is "no question that the statute was motivated wholly by religious considerations." *Lynch*, 104 S.Ct. at 1362. Alabama's statute provides a moment of silence for "meditation or voluntary prayer." Ala. Code §16-1-20.1 (1981). The Delaware statute, Del. Code Ann. tit. 14, §4101(b) (1975), provides "2 or 3 minutes to voluntarily participate in moral, philosophic, patriotic or religious activity." These statutes, on their face, unambiguously provide for both secular and non-secular activities. The legislatures appear to have been motivated by a good faith desire to accommodate students wishing to open the school day with silent prayer while simultaneously encouraging all students to develop habits of introspection, and in Delaware at least, to accommodate reflection on moral, philosophic and patriotic values. These purposes are secular, not religious.[12] That individual legislators may have considered accommodation of prayer to be more important

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12. Other secular purposes may also be served:

> Children frequently engage in games or noisy conversation as they journey to the schoolhouse, and school officials may well determine that a period of silence at the beginning of the school day is a useful expedient for calming the students so that they are prepared to take their studies seriously. Any reverent attitude which would prevail during the silent periods would be merely incidental to the secular purpose of quieting the students.

Note, *Religion and the Public Schools*, 20 Vand. L. Rev. 1078, 1093 (1967).

than accommodation of meditation cannot negate the fact that the statutes as enacted facilitate both meditation and prayer, and thus have secular as well as religious purposes.[13]

This case is clearly distinguishable from *Stone v. Graham*, 449 U.S. 39 (1980) (*per curiam*), in which this Court found the Ten Commandments to be "undeniably . . . sacred" notwithstanding a stated, albeit transparent, secular purpose. *Stone v. Graham*, 449 U.S. at 41. A moment of silence, however, is not inherently fraught with religious significance. Its religious meaning, or lack thereof, depends wholly on the choice of each participant. Therefore, where the legislature plainly intends the moment to be used for both religious and secular purposes, it cannot be inferred that only the religious purpose is genuine. *See Gaines v. Anderson*, 421 F. Supp. 337, 343 (D. Mass. 1976).

2. *Primary Effect*

The moment of silence is the embodiment of that "wholesome 'neutrality' " which *Schempp* advocated. 374 U.S. at 222. It requires only that students sit quietly for a few minutes or less, during which time they may pray, meditate, reflect or merely doze, as they choose. It does not encourage prayer; it merely accommodates those students whose individual consciences direct them to pray. Because it is conducted in silence, it invades no child's private thoughts and thus is entirely free from those elements of coercion and indoctrination which characterized the Bible-reading and spoken prayer in

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13. The lower court cases which have held that moments of silence do not meet the requirement of a secular purpose have done so on the ground that the secular purpose must be "primary," *Beck v. McElrath*, 548 F. Supp. 1161, 1165 (M.D. Tenn. 1982), *appeal dismissed, vacated, remanded, Beck v. Alexander*, 718 F.2d 1098 (1983), or "overwhelming," *May v. Cooperman*, 572 F. Supp. at 1572. If this ever was the correct standard, clearly, under *Lynch*, it no longer is.

Schempp, 374 U.S. at 223, and *Engel v. Vitale*, 370 U.S. at 431-32.

Although some courts have opined that moments of silence advance religion, their reasoning is stilted. Two cases, *Duffy v. Las Cruces Public Schools*, 557 F. Supp. 1013, 1021 (D.N.M. 1983), and *Beck v. McElrath*, 548 F. Supp. at 1101, simply fail to analyze the "effect" prong of the *Lemon* test separately from the "purpose" prong. Since these cases find that the purpose of moment of silence legislation is to promote religion, they find the effect to be a foregone conclusion. However, since moments of silence are supported by valid secular purposes, the effect prong must be given more attention.

May v. Cooperman held that the New Jersey moment of silence statute both advanced and inhibited religion. The court found that the statute advanced religion by "mandating a period when all students and teachers must assume the traditional posture of prayer of some religious groups. . ." *Cooperman*, 572 F. Supp. at 1574. Although the challenged statute was entirely silent on the question of required posture, one New Jersey school required students to sit with eyes closed, and one to stand with heads lowered and eyes closed during the silent period.[14] *Id. Cooperman* also apparently found offensive a simple sitting or standing requirement. *Id.* at 1569. However, the court suggested no alternatives to sitting or standing throughout the school day.

As this Court recently acknowledged in *Lynch*, "Comparisons of the relative benefits to religion of different forms of governmental support are elusive and diffi-

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14. Whether such posture requirements actually advance religion is beyond the scope of this brief. The district court, however, based its invalidation of the statute in part on its erroneous finding that the statute mandated certain postures. 572 F. Supp. at 1575. If, in fact, such requirements do advance religion, surely the remedy is to invalidate the additional posture requirements, and not the moment of silence itself.

cult to make." *Lynch*, 104 S.Ct. at 1363. *Lynch* found that including a creche in a city Christmas display was no more an endorsement of religion than Sunday Closing laws, *McGowan v. Maryland*, 366 U.S. 420 (1961); release time for religous training, *Zorach v. Clauson*, 343 U.S. 306 (1952); and legislative prayers, *Marsh v. Chambers*, ___ U.S. ___, 103 S.Ct. 3330 (1983). *Lynch*, 104 S.Ct. at 1363. By no stretch of the imagination can moments of silence be considered a greater aid to religion than any of these previously approved state activities. A moment of silence requires the suspension of activity for a few minutes at most, far less than the entire day set aside by Sunday Closing Laws. Like a release time program, it requires no student to participate in, or even to be aware of, another student's devotions.

Appellees may try to distinguish *Marsh* or *Lynch* on the basis that school children may be susceptible to pressure from teachers and peers.[15] Unlike *Marsh's* spoken invocation by a chaplain, the classroom activity at issue here is a pure moment of silence. It is free from coercion by teachers or other students.

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15. Appellees claim that the moment is just long enough for a student to recite the Lord's Prayer. Motion to Affirm at 10. Appellees insinuate that the state is therefore attempting to force children to recite the prayer silently to the exclusion of other activity. *Id.* This theory is akin to a teacher giving each student $5.00 with no spending restrictions. The student can save the money, buy a novel, a record, or a vast quantity of gum, as he pleases. It is ludicrous to claim that since a particular religious record might cost about $5.00 that the teacher is forcing the student to purchase that record over the other spending options. The moment of silence is even more impervious to coercion because the student need never disclose how the moment was spent.

The fear of peer pressure is equally unfounded. The sight of one quiet child will not force another child to recite a prayer to herself. Further, proponents of the peer pressure argument do not suggest that children be prohibited from wearing yarmulkes or crosses to school for fear of forcing other children to follow suit.

3. *Entanglement*

The Court of Appeals made no finding as to whether the Alabama moment of silence statute resulted in impermissible entanglement between church and state. *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983). In fact, such statutes do not require the state to interfere in any way with the administrative affairs of any church or sect, nor do they carry a potential for political divisiveness.

Only one case has held that moments of silence create problems of administrative entanglement, and in that case, the court simply seems to have lost sight of the meaning of the test. *Duffy*, 557 F. Supp. 1013, held that the monitoring of teachers by the school superintendent and school board to ensure that the moment of silence was administered in a non-religious fashion would constitute administrative entanglement between church and state. *Id.* at 1021. *Duffy* overlooked the fact that the state would be monitoring its own activities, not those of any church or sect. The core of the finding of administrative entanglement in *Lemon* was that the challenged activity required state surveillance or active interference with the administrative affairs of a religious institution. *Lemon*, 403 U.S. at 620. It requires a perverse mutation of *Lemon's* reasoning to conclude that the entanglement prong of the tripartite test prohibits a state from monitoring state activities.

Nor do moments of silence present a politically divisive potential. Under *Mueller v. Allen*, ____ U.S. ____, 103 S.Ct. 3062, 3071, n. 11 (1983) the political divisiness inquiry is limited to those cases which involve direct financial subsidies to parochial schools or school teachers. This is not such a case.

II. HISTORY SHOWS THAT THE FRAMERS OF THE FIRST AMENDMENT INTENDED THE GOVERNMENT TO HAVE THE POWER TO DESIGNATE TIMES APPROPRIATE FOR GENERAL PRAYER

Recently, this Court examined the practices of the First Congress and concluded that since the Framers of the First Amendment authorized the appointment of paid chaplains to serve the Congress just three days before they reached agreement on the language of the First Amendment, the Framers did not regard paid chaplains and opening invocations in the legislature to be a violation of the First Amendment. *Marsh v. Chambers*, ____ U.S. ____, 103 S.Ct. 3330, 3333-34 (1983). As this Court succinctly stated, "[t]heir actions reveal their intent." *Id.* at 3334.

In *Marsh*, this Court could look at the Framers' actions on the precise issue it had before it. Here, such an exact analogy is not possible, as moments of silence are of comparatively recent vintage. However, the Framers' actions in regard to a comparable, and, if anything, far more coercive, practice — the declaration of days of public prayer and thanksgiving — prove enlightening.

The first national day of thanksgiving proclaimed by the government of the United States was held on December 18, 1777[16] and, as *Lynch v. Donnelly*, ____ U.S. ____, 104 S.Ct. 1355 (1984) noted, the practice has continued with little interruption to the present day. *Lynch*, 104 S.Ct. at 1360, n.2.

These officially sponsored holidays are analagous to moments of silence in that they set aside a period of time in order that people may pray, if they choose. Children are given a school holiday in order that they may attend church, or other community or family functions. As with moments of silence, the opportunity for prayer is made

16. A Stokes & L. Pfeffer, *Church and State in the United States*, 504 (rev. 1st ed. 1964).

available to children and adults alike, but prayer is not compelled, nor is any form of worship given official recognition.

However, days of thanksgiving, in direct contrast to moments of silence, are fraught with express religious overtones. The presidential proclamations issued on days of thanksgiving were and often are still overtly religious.[17] Moreover, instead of occupying just a few seconds or a few minutes, days of thanksgiving interrupt the normal activities of schools and businesses for an entire day.

Despite the comparatively severe intrusion of government into religion which the proclamation of days of thanksgiving represent, the drafters intended the First Amendment to permit such proclamations. On September 25, 1789, the day after the Congress reached agreement on the wording of the First Amendment and recommended it to the states for ratification, Congress resolved to petition President Washington to proclaim a day of public thanksgiving and prayer.[18] The resolution carried despite one member's objection that religious

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17. The proclamation issued by President Washington in 1789 at the request of the First Congress is a case in point. It reads, in part:

> . . .I do recommend and assign Thursday, the 20th day of November next, to be devoted by people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country previous to their becoming a nation . . ."

R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 52 (1982). On September 15, 1983, President Reagan issued a Thanksgiving Proclamation stating in part, "I call upon Americans to affirm this day of thanks by their prayers and their gratitude for the many blessings upon their land and its people." Proclamation No. 5098, 48 Fed. Reg. 42, 801 (1983).

18. Cord, *supra* n.17 at 28.

matters were proscribed to the federal government.[19] It must be inferred, therefore, that the members of the First Congress expressly considered and rejected the notion that the First Amendment prohibited the federal government from designating times recommended for public prayer.[20]

Like the power to appoint paid chaplains for the legislature, the power to designate certain times as appropriate for those who wish to offer prayers, in the manner which suits them, is one which the Framers of the First Amendment earnestly debated. That the First Congress and three of the first four presidents believed that the new government had this power is "contemporaneous and weighty evidence" of the true meaning of the First Amendment. *Marsh*, 103 S.Ct. at 3334. A government which may set aside an entire day for the express purpose of encouraging children and adults alike to offer prayers and give thanks to God, certainly may designate a few minutes or less of the school day as a time for students to engage in quiet thought or prayer.

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19. *Id.* at 28.

20. Of the first four presidents, three believed, while in office, that the government had the power to designate times appropriate for general prayer through thanksgiving proclamations. Stokes & Pfeffer, *supra* n.16 at 87-89. Thomas Jefferson was the only one of the earliest presidents who did not issue such proclamations, and his objection was not that such action would be an intolerable intrusion of the state into the religious affairs of private citizens, but that it would be a federal usurpation of power reserved to the state. Letter to Rev. Miller, Jan. 23, 1808. 9 *The Writings of Thomas Jefferson* 174 (P. Ford ed. 1899). As a member of the committee appointed in 1776 to revise Virginia law, Jefferson recommended a "Bill for Appointing Days of Public Fasting and Thanksgiving." R. Healey, *Jefferson on Religion in Public Education*, 135 (1962), and in his autobiography, he relates how he used such a proclamation to stir up the citizenry against the British. *Autobiography*, 1 Ford, *supra* at 9-11.

James Madison issued at least four proclamations designating days of prayer and thanksgiving during his presidency. Cord, *supra* n. 17 at 31. Although he later theorized that such proclamations might be beyond the power of the federal government, *id.* at 30, his

The Framers also breached the wall of separation in other ways as evidenced by the United States' frequent money and land grants for churches and ministers in the early years of the nation. Madison, Jefferson, Washington, Monroe, and John Quincy Adams all participated in treaties with the Indians which appropriated such moneys.[21]

Sunday closing laws, also religious in nature, were apparently consistent with the Framers' concept of the First Amendment.[22] Nor is there evidence that Jefferson

---

actions as president, because more closely contemporaneous with the adoption of the First Amendment, are better evidence of what Madison intended the amendment to mean. Moreover, Madison justified his actions in these terms: "I was always careful to make the proclamation absolutely indiscriminate, and merely recommendatory; or rather, mere designations of a day on which all who thought proper might unite in consecrating it to religious purposes, according to their own faith and forms." Letter to Edward Livingston, July 10, 1822, *The Complete Madison* 308 (S. Padover ed. 1953). Thus the features which redeemed thanksgiving proclamations in Madison's eyes are precisely those features which moments of silence share: their non-coercive nature as mere designations of a time available for prayer, and their non-discriminatory treatment of all faiths.

21. Cord, *supra* n. 17 at 41 (1787 Continental Congress' grant of lands in trust to the Moravian Brethren to promote Christian religion among Indians. James Madison was a member of the conveying committee); *Id.* at 54 (First, Second and Third Congress authorizing appointment of paid military chaplains); *Id.* at 58 (President Washington's 1779 Treaty authorizing funds to build a church for the Indians); *Id.* at 38-39 (President Jefferson's 1803 treaty with the Kaskaskia Indians, including grants to pay for a church and a Catholic priest); *Id.* at 59 (President Monroe's Indian Treaty of 1819 granting land for the use of the Catholic Church); *Id.* (President John Quincy Adams' provision for a missionary establishment in an 1825 Indian Treaty); *Id.* at 71 (Adams' Fourth Annual Message to Congress outlining a policy of converting Indians to Christianity and of religious education). Presidents Jackson and Van Buren continued the practice of granting money or land to churches through treaties. *Id.*

22. For a discussion of Madison's sponsorship of Sunday closing laws and a proposed penalty for Sabbath breakers, see *McGowan v. Maryland*, 366 U.S. 420, 437-39 (1961).

or Madison objected to tax exemptions for churches.[23]

Thomas Jefferson's own perspective on education is fully consistent with a moment of silence for prayer or meditation. Jefferson was a firm believer in moral and ethical conduct.[24] True, he fought hard against the establishment of an official religion, but Jefferson sought to preserve religious freedom, not to abolish all religion or to eradicate any system of morals or values.[25]

Jefferson also recognized the value of a brief respite in the course of study:

> There are portions of the day too when the mind should be eased, particularly after dinner it should be applied to lighter occupation: history is of this kind. It exercises principally the memory. Reflection also indeed is necessary but not generally in a laborious degree.[26]

James Madison may have quarreled with overbearing clergy,[27] but never with the right of citizens to practice their own religion:

> The Religion then of every man must be left to the convictions and conscience of every man; and it is the right of every man to exercise it as these may dictate.[28]

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23. Cord, *supra* n. 17 at 190.

24. Healy, *supra* n. 20 at 144-145. *See also* Jefferson's letter to Peter Carr, Aug. 10, 1787, in 4 Ford, *supra* n. 20 at 427-428.

25. In fact, Jefferson anticipated that students would be expected to attend religious services at or near the university with the students' particular sect. Cord, *supra* n. 17 at 155, *quoting* "The University of Virginia, Regulations," October 4, 1824.

26. Letter to Thomas Mann Randolph, Jr., Aug. 27, 1786 (outlining a course of study) in 4 Ford, *supra* n. 20 at 291.

27. Padover, *supra* n. 20 at 298.

28. Memorial and Remonstrance Against Religious Assessment, 1785, in Padover, *supra* n. 20 at 299-300. Madison further stated: "The sacred obligations of religion flow from the due exercise of opinion, in the solemn discharge of which man is accountable to his God alone. . . ." Address to the General Assembly of Virginia, January 23, 1799. *Id.* at 296.

The moment of silence preserves the right of each student to listen to the dictates of his or her own conscience.

Much can be said of the Framers' intent with regard to Freedom of Religion. Contradictory evidence can be marshalled by each party in this case, for history is replete with inconsistency. Whatever else can be said of the historical light cast by our forefathers, however, this much is true: a principal reason for our ancestors' flight to this new world was the quest for religious freedom.

That freedom was hard won and imperfectly executed. Free exercise has been freer for some faiths than others, and some faiths have come closer to establishment than others. Nonetheless, one of our nation's oldest and highest ideals has been that of religious freedom and toleration. We pride ourselves in our freedom to possess our innermost thoughts and deepest beliefs.

A moment of silence, while harming no one, preserves that freedom of thought, that right to private faith, for each school child.

III. A MOMENT OF SILENCE IS A COMMON PRACTICE IN EVERYDAY LIFE AND AN APPROPRIATE AND VALUABLE ASSET TO CHILD DEVELOPMENT.

America is steeped in a tradition which pauses to commemorate persons, events, and customs. A moment of silence, rather than being a purely religious observance, echoes the national practice of reflection.

We celebrate national holidays, such as Memorial Day, in which we remember those who died in service to the United States. The President is authorized and requested, pursuant to 36 U.S.C. §169g (1950) ("Memorial Day as a day of prayer for permanent peace"), to call upon us to pray:

> . . . each in accordance with his religious faith, for permanent peace; designating a period during such

> a day in which all the people of the United States may unite in prayer for a permanent peace; calling upon all the people . . . to unite in prayer at such time . . .[29]

We sometimes bring our daily activities to a halt in memory of one who has just died. For example, this Court declared a recess upon the death of Herbert Hoover "as a mark of respect to the memory of the former President." Proceedings on the Death of Mr. Herbert Hoover, 379 U.S. vii (1964).

Even our cultural and leisure events sponsor pauses in the routine. The theatres on Broadway darken for a moment on the death of a Broadway star. Television news shows project a picture without commentary upon the death of a national figure. Charles Kurault on *CBS News Sunday Morning* regularly ends the broadcast with a brief segment, without dialogue, which shows some aspect of man or nature which merits our reflection. Thousands of sports enthusiasts in baseball stadiums pause to remember a deceased sports hero; in lighter moments, players and fans take a "seventh inning stretch."

Challengers may claim that because children are young and vulnerable, a moment of silence may harm

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29. Independence Day is another such day. It was celebrated and treasured by Thomas Jefferson and John Adams, two of those who gave us the legacy of independence. 10 *The Writings of Thomas Jefferson*, 390-91 (Ford ed. 1899); *The Selected Writings of John and John Quincy Adams*, xxxiii (Koch and Peden ed. 1946). *See also* 36 U.S.C. §169h (1952) ("National Day of Prayer", for "prayer and meditation at churches, in groups, and as individuals"); Proc. No. 4411, December 31, 1975, 41 F.R. 1035 (Urging reflection during the Bicentennial Year on the "historic events of the past . . . and on . . . those who helped shape our constitutional government"); and 36 U.S.C. §149 (1937) (Commemorating Thomas Jefferson's birth by observance "in schools and churches, or other suitable places . . ."); as examples of national observances which ask us to think, remember, and pray as we wish.

them. On the contrary, a moment of silence is particularly helpful for children. Children may not face the same types of stress that confront adults; nonetheless, we can all recall the worries over grades, the criticisms from one's peers and the relationships with both parents and teachers which once loomed large in our lives.

"Time out" in a child's day provides a time to reflect, a time to "regroup" and to arm one's self for the daily battles of life:

> . . . [T]he unrelieved, generalized stress that is pervasive in modern life is nothing but destructive to children. Children need to acquire skills that will enable them from time to time to pull back from the turmoil. They must learn how to turn inward. By turning inward I mean developing an inner awareness—an ability to find and enjoy the quietness and stillness of the inner self. If children never learn how to turn inward they may be affected adversely by unrelieved stress. It's not, however, simply a question of shutting off the external world. I tell the children to think of something quiet. I tell them to think of something inside themselves — to turn their eyes inward. The desired effect is to change their attention, however briefly, from the hectic, external world to the more peaceful world of mind and thought and fantasy.

C. Cherry, *Think of Something Quiet: A Guide for Achieving Serenity in Early Childhood Classrooms* 3-4 (1981).

On a less dramatic scale, the moment of silence in opening exercises helps to calm the child from the morning worries — the run to the bus, the forgotten lunch, the unfinished homework, the fumble with coat and books — and eases the child into a mood more conducive to learning. It acts as a natural "buffer" between the race against the school bell and the quest for knowl-

edge. It also assists the teacher to create a learning atmosphere free of distraction from the normal chaos at the start of the day. It is a part of our nature to suspend our rush through the day and allow ourselves a moment to reflect. We are free to cherish that moment or allow it to pass indifferently. We are free to do so, because we shelter our private thoughts, however shallow or lofty, free from the intrusion of others.

If such quiet thoughts amount to a religious ceremony, then logic dictates a prohibition of thinking in school. Destruction of our freedom to think stands the First Amendment on its head.

May v. Cooperman, 572 F. Supp. 1561, 1574-75 (D.N.J. 1983), *appeal docketed*, Nos. 83-5890 (3rd Cir. Dec. 10, 1983), 84-5126 (3rd Cir. Feb. 28, 1984) held that a requirement that students remain seated or standing during a moment of silence violated free exercise and simultaneously improperly reflected "one traditional form of prayer."[30] Presumably those postures must offend at anytime, not just during opening exercises. There are few conceivable positions remaining, however, for students to assume. Most public school students will be found "guilty" of sitting or standing during the school day.

With the lower courts leading the charge, society has hurtled past common sense on the way to the Constitution. It is inconceivable that students claim a constitutional right not to think, parents invoke the Constitution to challenge a teacher's fundamental authority to ask students to sit still and be quiet, and judges find sitting and standing to violate the First Amendment.

We respectfully ask the Court to help find our way back to the Constitution and to reason.

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30. This argument is also asserted here, in the Brief of the American Civil Liberties Union and the American Jewish Congress as Amici Curiae in Support of the Motion to Dismiss or Affirm, No. 83-812 at 35-37.

CONCLUSION

The decision of the Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully submitted,

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APPENDIX

OPINION OF THE ATTORNEY GENERAL
OF THE STATE OF DELAWARE
NO. 79-1011

April 12, 1979

Honorable W. Lee Littleton
Senator
Legislative Hall
Dover, Delaware 19901

Re: Voluntary Prayer in Public Schools
Opinion No. 79-I011

Dear Senator Littleton:

You have asked the opinion of this Office on a number of questions related to prayer in the public schools. We will address those questions seriatim.

First you have asked whether 61 *Del. Laws* c. 547 ("the Act") permits voluntary prayer in public schools. The language of 14 *Del. C.* §4101(b), as amended by the Act, provides:

> [D]uring the initial period of study on each school day all students in the public schools of Delaware shall be granted two or three minutes to voluntarily participate in moral, philosophical, patriotic or religious activity. For the purposes of this section, 'religious activity' shall include voluntary prayer at the beginning of each school day." (Underscored language was added by the Act.)

The plain language of the Act and its synopsis indicate clear legislative intent to permit prayer as an exercise which a student may choose. The key words in the Act should be construed according to their usual, ordinary and natural meaning. *McGinnes v. Department of Finance*, Del. Ch., 337 A.2d 16, 20 (1977). We note, however, that federal constitutional principles mandate that this be a silent exercise.

The First Amendment to the United States Constitution, which is also applicable to the States, provides in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

The United States Supreme Court has held that the First Amendment prohibits recitation of prayer in the public schools. *School District of Abington Township v. Schempp*, 374 U.S. 203, (1963). That decision does not necessarily forbid a period of silence for pupil meditation. As Justice Brennan said in his concurring opinion in *Schempp*:

> It has not been shown that . . . the observance of a moment of reverent silence at the opening of class, may not adequately serve the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government. *Id.* at 279.

In considering proposed legislation authorizing a period of silent meditation in schools the Justices of the New Hampshire Supreme Court concluded:

> [N]either the encouragement nor authorization of voluntary silent meditation . . . violates the First Amendment to the Constitution of the United States as interpreted by the United States Supreme Court. *Opinion of the Justices*, N.H. Supr., 307 A.2d 558, 560 (1973).

Similarly, 14 *Del. C.* §4101(b), insofar as it authorizes silent prayer among other activities of a non-religious nature, does not violate the First Amendment.

You have also asked whether students who choose not to participate in activities permitted under 14 *Del. C.* §4101(b) may be excused from the classroom so that the remaining students may pray audibly. The Supreme Court held in *School District of Abington Township v.*

Schempp, supra, that the First Amendment requires courts to ask the following question in reviewing the propriety of State Laws affecting religion:

> [W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. . 374 U.S. at 222.

In the *Schempp* case the Supreme Court dealt with challenges to a Pennsylvania law which required the daily reading of ten verses from the Bible and a Maryland law which required daily Bible readings and recitation of the Lord's Prayer. Both statutory schemes permitted children to be excused if parents so requested. Both Maryland and Pennsylvania defended their daily religious exercises in part by arguing that children who requested exemption from the activities were not required to participate. One of the plaintiff-parents in the Pennsylvania case argued that if a child regularly absented himself or herself from the classroom during the religious exercises, the "children's relationships with their teachers and classmates would be adversely affected." 374 U.S. at 208.

The Supreme Court ruled that both statutory programs violated the First Amendment. The Court also rejected the defense raised by the two states that the "voluntariness" of the programs saved them from legal attack. The Court said:

> Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality. . . . *Id.* at 224-225.

In the *Schempp* case, the Supreme Court followed *Engel v. Vitale*, 370 U.S. 421 (1962), a case decided the year before. That case voided a New York program in which students were to recite a brief standard prayer. Though participation in the prayer was voluntary, the Court held that:

> [n]either the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause . . . of the First Amendment. *Id.* at 430.

These cases, when read together, indicate that even if a student or group of students object to and are excused from some concerted religious exercise, the Court will disapprove of the State program if the "purpose and effect" of the plan is to advance or inhibit religion. You suggest a scheme in which all nonparticipants leave a classroom while all participants remain behind to recite a voluntary audible prayer. It is likely that the Supreme Court would find that such a plan has the "purpose and effect" of advancing the religion of those remaining in the classroom and therefore would not pass muster under the First Amendment to the United States Constitution. The effect would be to:

> aid those religions based on a belief in the existence of God as against those religions (or non-religions) founded on different beliefs. *Torcaso v. Watkins*, 367 U.S. 488 (1961), cited with approval in *University of Delaware v. Keegan*, Del. Ch., 318 A.2d 135 (1974), rev'd. on other grounds, Del. Supr., 349 A.2d 14 (1975).

Further, it is likely that based upon the authorities discussed above, the "voluntariness" of the program proposed would not save it from constitutional infirmity.*

Since the answer to the second question is negative, a response to the third question is not necessary. If you have any questions concerning this opinion, please do not hesitate to contact me.

Sincerely,

/s/

Roger A. Akin
Deputy Attorney General

APPROVED:

/s/

Richard S. Gebelein
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* It should be noted that the courts have felt that the removal of children from the room creates a stigma as to those children not participating in the exercises thereby applying peer pressure to participate. Thus the courts conclude that the effect is state action to encourage religion.

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IN THE

Supreme Court of the United States

October Term, 1983

No. 83-812

GEORGE C. WALLACE, Governor, et al.,

Appellants,

v.

ISHMAEL JAFFREE, et al.,

Appellees.

No. 83-929

DOUGLAS T. SMITH, et al.,

Appellants,

v.

ISHMAEL JAFFREE, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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ISHMAEL JAFFREE, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE FREEDOM COUNCIL, AMICUS CURIAE, IN SUPPORT OF THE APPELLANTS

INTEREST OF AMICUS CURIAE[1]

This case presents important issues concerning the power of the state to recognize and accommodate America's religious pluralism and diversity in the operation of the public

[1] Counsel of record to the parties in the cases described above have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

schools without infringing upon the freedom of conscience of individual students or teachers. The Freedom Council is greatly concerned about the implications for religious freedom and tolerance raised by the Court of Appeals' decision in this case. The Freedom Council believes that the Court of Appeals ruling swept too broadly when it invalidated the Alabama meditation or silent prayer statute. The statute does not advance religion. It merely provides for a period of silence that recognizes in neutral fashion the freedom of conscience of each teacher and student. Teachers are free to decide whether or not to observe a period of silence and students are free to utilize the period of silence in the manner they individually choose. Such activity merely advances the spirit of pluralism and toleration intended by the First Amendment and does not constitute an unlawful establishment of religion.

The Freedom Council is a non-profit religious corporation organized to defend, restore, and preserve religious liberties guaranteed by the Constitution. With chapters in each of the 50 states, the Freedom Council is also affiliated with student groups on over 70 college campuses and with the Christian Broadcasting Network, currently the largest cable television network in the United States reaching over 20 million homes. The Freedom Council assists its chapters and associated organizations in addressing issues on the local, state and national levels that have a significant impact on First Amendment religious freedoms.

Amicus Curiae is represented by participating attorneys from The Rutherford Institute, a non-profit religious corporation named for Samuel Rutherford, a 17th-century Scottish minister and Rector at St. Andrew's University. Through the efforts of its staff and affiliated local chapters, attorneys and lay persons, the Institute undertakes to assist

litigants and to participate in significant cases relating to First Amendment religious freedoms. Counsel for *Amicus Curiae* have specialized in constitutional litigation, including the Religion Clauses of the First Amendment, and have participated as counsel for *amici curiae* in previous cases before this Court. Counsel John W. Whitehead has argued and served as special constitutional consultant in numerous First Amendment cases and has authored several books and law review articles that focus on interpretation and application of the First Amendment Religion Clauses. The Freedom Council believes the expertise of its counsel will be of assistance to the Court in this case.

SUMMARY OF ARGUMENT

In prior cases, this Court has relied upon the intent of the Framers of the Bill of Rights for understanding the meaning and reach of the Establishment Clause. The historical record shows that the climate of the revolutionary period was fundamentally religious and favored government accommodation of religious practices, some of far more significance than the Alabama law in question. Both Jefferson and Madison, often cited for their disestablishmentarian views, in fact tolerated and approved numerous religious practices in the public schools and in public life. Jefferson, for example, was President of the School Board of the District of Columbia where the Bible and the Watts Hymnals were used as primary texts. Moreover, our national history is replete with examples of government, in a spirit of toleration and accommodation, recognizing, as the State of Alabama has in this case, America's religious tradition and culture, but without infringing on the rights of conscience of those who do not subscribe to particular tenets of that tradition or culture.

The Alabama law in question is permissive. It provides an opportunity to observe a period of silence in which each may meditate or voluntarily pray. It respects the inviolability of conscience that is at the heart of the Free Exercise Clause. It is not a constitutionally proscribed establishment of religion. It merely advances in neutral fashion the freedom to believe (or not to believe) and constitutes the type of affirmative, yet neutral, accommodation mandated by the First Amendment.

The Alabama law also satisfies the "tri-partite test" of *Lemon* v. *Kurtzman*, 405 U.S. 602 (1971). Secular means and ends are furthered by the period of silence, including the interests of calling the classroom to order, instructing the students in self-discipline, teaching the students respect for the authority of the teacher, permitting students to contemplate serious thoughts and values, engendering an appreciation for this nation's cultural and religious heritage and promoting religious liberty and tolerance through voluntarism. Any nominal aid to religion is incidental to the purposes of the statute and *de minimus* when compared to statutory enactments this Court has approved in the past.

ARGUMENT

I.

Alabama's Statutory Provision Which Permits Public School Teachers To Begin The School Day With Meditation Or Silent Prayer Does Not Conflict With The Intentions Of The Framers Of The First Amendment As Revealed In Their Words, Deeds, And History.

History provides varied and ample evidence that among the founders of this Republic and its early presidents and congresses, the universal sentiment towards religion was one of accommodation, not merely toleration. It is *unequivo-*

cably clear from the language, intent, and history surrounding the adoption of the First Amendment that the separation of church and state intended by the Bill of Rights was of limited effect and that amicability, not hostility to the free exercise of religion, was the *shibboleth* of that era.

In Religion Clause adjudication, no less than any other area of law, Justice Holmes' statement is most fitting: "A page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921). The determination of "the ultimate constitutional objective" as expressed by the Framers and *"as illuminated by history"* is of particular relevance here. *Lynch* v. *Donnelly*, ___U.S. ___, ___, 104 S.Ct. 1355, 1361 (1984); *Walz* v. *Tax Commission*, 397 U.S. 664, 671 (1970). In this regard, this Court has said:

> In applying the First Amendment to the states through the 14th Amendment, *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), it would be incongruous to interpret that clause as imposing more stringent First Amendment limits on the states than the draftsmen imposed upon the Federal Government.

Marsh v. *Chambers*, ___ U.S. ___, ___, 103 S.Ct. 3330, 3335 (1983). Because of this basic constitutional presupposition, concrete, specific historical evidence of the Framers' views on religion and religious practices in public life must be placed at a premium to understand the reach and meaning of the First Amendment Religion Clauses.

A. The Views Of Thomas Jefferson And James Madison.

The views of Thomas Jefferson and James Madison have been previously recognized by this Court as most instructive. *Everson* v. *Board of Education*, 330 U.S. 1 (1947). Al-

though Thomas Jefferson can in no sense be regarded as a Framer of the First Amendment, this Court, in its early Religion Clause cases, has adopted the view that "the framers spoke in a wholly Jeffersonian dialect and those who ratified it fully understood that style of speech." M. Howe, *The Garden and the Wilderness* 10 (1965).[1] At the time of the drafting and adoption of the First Amendment, Jefferson was in France. However, through his correspondence with James Madison, his influence was at least partially felt.

In many ways, the views of Madison and Jefferson were *not* representative of those of the Framers of the Constitution. Both Madison and Jefferson were from Virginia and were central figures in the fight in that state for the disestablishment of the Church of England. *See Everson* v. *Board of Education,* 330 U.S. at 11-13 and 33-42 and *Engel* v. *Vitale,* 370 U.S. 421, 428-429 (1962)[2]

Not all states, however, shared Madison's and Jefferson's fervor for disestablishment. As this Court has previously noted, at the outbreak of the Revolutionary War, "there

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[1] Antieau, Downey and Roberts note, however, that: "[T]he First Amendment was hardly the exclusive product of any one person. Subsequent interpretations of the Amendment should not be controlled by the singular statements of Madison [or] Jefferson. . . . An examination of the early activities of the Federal Government indicates that the people approved and welcomed its aid to church related activities. . . . There was undoubtedly the faith that subsequent generations of Americans would be able to utilize the power of the Federal Government to promote the concurrent interests of government and religion under First Amendment norms that were reasonable, pragmatic, and just." C. Antieau, A. Downey and E. Roberts, *Freedom From Federal Establishment* 207-209 (1964).

[2] Both Madison's *Memorial and Remonstrance Against Religious Assessments,* written in 1785 in opposition to legislation which would use Virginia's public funds to pay teachers of the Christian religion, and Jefferson's *Bill for Establishing Religious Freedom* in Virginia, proposed in 1779 and enacted in 1786, were central documents to these disestablishmentarian forces.

were established churches in at least eight of the thirteen former colonies and established religions in at least four of the other five." *Engel* v. *Vitale,* 370 U.S. at 428. The disestablishment of state churches was by no means complete by the time of the ratification of the Federal Constitution. Indeed, the Congregational Church was not disestablished in Connecticut until 1818 and in New Hampshire until 1819. The last of the colonies, Massachusetts, was not disestablished until 1833. P. Stokes and L. Pfeffer, *Church and State in the United States* 77-78 (1964).

This history of state church establishment illustrates that the term "establishment" had a fixed meaning in the minds of the drafters. On the Federal level, "[t]he real object of the [first] amendment was. . . to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government." *Lynch* v. *Donnelly,* 104 S.Ct. at 1361, *citing* 2 J. Story, *Commentaries on the Constitution of the United States* 593-595 (2d ed., 1851). This restriction was *institutional* in nature. As Jefferson's often quoted expression stated, the Religion Clauses were to build "a wall of separation between *Church* and *State.*" 8 *Works of Thomas Jefferson* 113 (Washington ed. 1861) (emphasis supplied). No wall of separation was intended, however, even by Jefferson, to seal religion hermetically from governmental activities. The *institution* of the church was to be isolated from the *institution* of the state. As Jefferson stated in 1817:

> If by *religion,* we are to understand *sectarian dogmas,* in which no two of them agree, then your exclamation on that hypothesis is just, "that this would be the best of all possible worlds, if there were no religion in it." But if the moral precepts, innate in man, and made a part of his physical constitution, as necessary for a social being . . . in which all agree, constitute true re-

> ligion, then, without it, this would be, as you again say, "something not fit to be named even, indeed, a Hell."

15 *The Writings of Thomas Jefferson* 109 (Memorial ed. 1904). Indeed, it must be noted: "Probably, at the time of the adoption of the constitution, and of the amendment to it now under consideration, the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship." J. Story, *supra; see also* H. Black, *Constitutional Law* 515 (4th ed., 1927) and T. Cooley, *Principles of Constitutional Law* 224 (1893).

That this sort of accommodation of religious freedom was compatible with the alleged "separationist" views of Thomas Jefferson was particularly evident in Jefferson's actions in the field of education. Jefferson as President repeatedly departed from the fastidious separationism which revisionist historians have attributed to him. For example, on three separate occasions, Jefferson signed into law extensions of a land grant given by the Federal government specifically to promote proselytizing amongst the Indians. R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 41-46 (1982).[3] Further, in 1803, President Jefferson proposed to the United States Senate a treaty with the Kaskaskia Indians in which the Federal government would agree to "give annually for seven years one hundred dollars

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[3] *An act regulating the grants of land appropriated for military services, and for the society of the United Brethren for propagating the gospel among the heathen, and for other purposes,* as extended by: *An Act in addition to an act, intituled etc.,* Ch. 30, 2 Stat. 155-156 (Peters ed. 1845); *An Act to revive and continue in force, etc., and for other purposes,* Ch. 30, 2 Stat. 236-237 (Peters ed. 1845); and *An Act granting further time for locating military land warrants, and for other purposes,* Ch. 26, 2 Stat. 271-272 (Peters ed. 1845).

towards the support of a priest" and "further give the sum of three dollars to assist the said tribe in the erection of a church." *A Treaty Between the United States of America and the Kaskaskia Tribe of Indians,* 7 Stat. 78-79 (Peters ed. 1846). The treaty was ratified on December 23, 1803, and included a specific appropriation for a Catholic mission, *at President Jefferson's request.*

Jefferson's involvement in the accommodation of the religious nature of the American people was not limited to Federal grants for the proselytizing of Indians. It extended as well to general public education. Jefferson was the first president of the school board in the District of Columbia in which the Bible and the Watts Hymnal were used as the primary texts. J. Wilson, *Public Schools of Washington,* 1 Records of the Columbia Historical Society 4 (1897). Mr. Jefferson also advocated religious instruction at the University of Virginia, of which he was a founder. Although the University was wholly governed, managed and controlled by the Commonwealth of Virginia, Jefferson believed that religious instruction on the school's premises was "most interesting and important to every human being...The want of instruction in the various creeds of religious faith existing among our citizens presents, therefore, a chasm in the general institution of the useful sciences." *McCollum* v. *Board of Education,* 333 U.S. 203, 245-246 (1948) (Reed, J., dissenting), *citing* 19 *The Writings of Thomas Jefferson* 414-417 (Memorial ed., 1904). Clearly, Jeffersonian state disestablishment did not require the eradication of religion from public schools, even though Virginia's *Bill for Establishing Religious Freedom* may have had much more stringent provisions than those constraining the Federal government.

James Madison, although often cited as antagonistic toward religion, participated in the creation of several

government sponsored religious practices.[4] Madison is repeatedly noted for leading the disestablishment forces against Patrick Henry's *A Bill Establishing a Provision for Teachers of the Christian Religion,* which would have provided a subsidy to religion. It is apparent, however, that Madison's *Memorial and Remonstrance Against Religious Assessments* was specifically pointed at discriminatory aid along sectarian lines. In fact, Madison seemed especially opposed to inequal treatment caused by discrimination along denominational lines. R. Cord, *supra,* at 20-21.

Later acts by Madison further clarify that he was not opposed to governmental benevolence towards religion generally. A primary example of Madison accommodating the religious needs of the American people occurred three days before final agreement upon the wording of the Bill of Rights. Madison, a participant in the first House of Representatives, was a member of the congressional committee that recommended the chaplain system. H. R. Rep. No. 124, 33rd Cong., 1st Sess. (1789), *reprinted in* 2 *Reports of Committees of the House of Representatives* 4 (1854). Madison himself voted for the bill authorizing payment of chaplains for their services. 1 *Annals of Cong.* 891 (J. Gales ed. 1834) and *Marsh* v. *Chambers,* 103 St. Ct. at 3333. Reverend William Linn was elected as chaplain to the House of Representatives and five hundred dollars was appropriated from the Federal treasury to pay his salary.

On September 25, 1789, the same day that final agreement was reached upon the wording of the Bill of Rights,

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[4] It is interesting to note that in the same year that Madison and Jefferson's collaborative efforts resulted in the passage of *A Bill for Establishing Religious Freedom,* Madison presented to the Virginia legislature *A Bill for Punishing . . . Sabbath Breakers,* which imposed a fine of "ten shillings for every such offence." *McGowan* v. *Maryland,* 366 U.S. 420, 438-439 (1960).

the House resolved to request that President Washington proclaim a Day of Thanksgiving to acknowledge "the many signal favors of Almighty God." *Journal of the House of Representatives* 123; *Journal of the Senate* 88; *Marsh* v. *Chambers*, 103 S.Ct., at 3334. James Madison endorsed this and other proclamations calling for Thanksgiving, fasting and prayer. R. Cord, *supra*, at 28-29. Indeed, later, as President, Madison issued at least four "Thanksgiving Day" executive proclamations. Those occurred on July 9, 1812, July 23, 1813, November 16, 1814 and March 4, 1815. *Id.* at 31.

These actions of Madison and Jefferson are of particular interest because they are contemporaneous with, and proximate to, the drafting of the First Amendment. As this Court has held, "historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied . . . —— their actions reveal their intent." *Marsh* v. *Chambers*, 103 S.Ct. at 3344.

If James Madison and Thomas Jefferson are an anomaly, it is because of their fervor for disestablishment. Yet, the evidence is clear that both Virginians advocated, participated and authorized *Federal government funding* and sponsorship of patently religious activities which generally exceeded that degree of accommodation fostered by the Alabama law involved in the present case.

B. Executive And Congressional Actions In Support Of Our Religious Heritage.

Other manifestations of governmental benevolence towards religion of a greater magnitude than the Alabama law are manifest. Universally, the oath of office for Presidents has been administered upon the Bible. By resolution

adopted by both houses of Congress it was decided that "divine services" should be held in St. Paul's Chapel in the District of Columbia to be "performed by the Chaplain of Congress" following the administration of the oath of office to George Washington in 1789. P. Stokes and L. Pfeffer, *supra,* at 87. On April 30, 1789, Washington upon assuming office stated, "...it would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe..." *Engel* v. *Vitale,* 370 U.S. at 446 (Stewart, J., dissenting).

Each of our Presidents, from George Washington to the present Chief Executive has, upon assuming his office, asked the protection and help of God. An impressive grouping of such invocations appears in *Engel* v. *Vitale,* 370 U.S. at 446-449. As previously mentioned Presidents Washington, Adams, and Madison issued, at the request of Congress, Presidential Thanksgiving proclamations. Such executive expressions can not be cavalierly relegated to the archaic past, but must be recognized as part of our rich inheritance of "countless...illustrations of the Government's acknowledgement of our religious heritage and governmental sponsorship of graphic manifestations of that heritage." *Lynch* v. *Donnelly,* 104 S.Ct. at 1361.

Of course, such accommodations to the spiritual needs of the American people are not limited to the Executive Branch. Congress, besides being integrally involved in the adoption of legislative prayer and paid Congressional Chaplains, initiated the proclamations already discussed. Perhaps more important the Continental Congress enacted the Northwest Ordinance on July 13, 1787. That ordinance, in part, provided:

> Religion, morality, and knowledge being essential to good government and the happiness of mankind,

schools and the means of education shall forever be encouraged.[5]

Ord. of 1787, July 13, 1787, Art. 3, reprinted in *Documents Illustrative of the Formation of the Union of American States* 52 (1927). On August 7, 1789 (after the agreement to the final wording of the Bill of Rights), the Congress of the newly formed Federal government reenacted the Northwest Ordinance. *An Act to provide for the Government of the Territory Northwest of the river Ohio* (Northwest Ordinance), Ch. 8, 1 Stat. 50-51 (Peters ed. 1845).

This Federal grant of land for the promotion of "religion, morality, and knowledge" was not a unique occurrence among the early settlers. For example, in 1795, President Washington concluded a treaty with the Oneida, Tuscorora and Stockbridge Indians in which the United States paid "one thousand dollars, to be applied in building a convenient church at Oneida," to replace the one which the British burned in the Revolutionary War. *A Treaty Between the United States and the Oneida, Tuscorora, and Stockbridge Indians, dwelling in the Country of the Oneidas,* 7 Stat. 47-48 (Peters ed. 1846). Later in 1819 in a treaty with the Wyandot Indians, Article I of the treaty granted six hundred and forty acres to the rector of the Catholic Church of St. Anne in Detroit. *Articles of a (Wyandot Indian) Treaty,* 7 Stat. 160, 166 (Peters ed. 1846). In 1825, President John Quincy Adams provided in a treaty with the Osage Indians for a "Missionary establishment" to teach, civilize and im-

[5] A. Stokes and L. Pfeffer comment on one manifestation of such encouragement: "Also worthy of mention in this listing of the official acts and utterances of the founders before the Constitution are the resolution of Congress in 1777 instructing the Committee on Commerce to import twenty thousand copies of the Bible and its resolution of 1782 approving 'the pious and laudable undertaking' of a printer named Robert Aitken in publishing an American edition of the Holy Scriptures." A. Stokes and L. Pfeffer, *supra,* at 85.

prove the indians. *Articles of a (Osage Indian) Treaty,* 7 Stat. 242-43 (Peters ed. 1846). As late at 1833, we find the Federal government obligated to pay "thirty seven hundred dollars, for the erection of a mill and church" as terms of a treaty with the Kickapoo Indians. *Articles of a (Kickapoo Indian) Treaty,* 7 Stat. 391-392 (Peters ed. 1846).

Besides these treaties with the individual Indian tribes, Federal money was expended to support religious schools and training —— a policy of "civilizing the Indians." This policy was implemented almost exclusively by religious societies, fulfilling the Federal government's "duty to use . . . [its] influence in converting to Christianity and bringing within the pale of civilization" the Indian tribes. 2 J. Richardson, *A Compilation of the Messages and Papers of the Presidents, 1789-1897* 415-416 (1901) (Address by President John Quincy Adams in his Fourth Annual Message to Congress on December 2, 1828). The list of tribes and Missionary societies supported from Federal funds is quite extensive. 2 *American State Papers* 275-277 (J. Gales ed. 1834). Direct subsidies were given from the Federal treasury to the following religious societies: the United Brethren, the American Board of Commissioners for Foreign Missions, the Baptist General Convention, the Protestant Episcopal Church of New York, the Hamilton Baptist Missionary Society, the Methodist Society, the Synod of South Carolina and Georgia, the Society of Jesuits, the Cumberland Missionary Board, and the Society for Propagating the Gospel. 1 *U.S. Office of Indian Affairs, Annual Reports of the Commissioner of Indian Affairs, 1824-1831* (1976) (Report of November 24, 1827).

These treaties and grants are of particular relevance since, as this Court has noted "the interpretation of the Establishment Clauses by Congress in 1789 takes on special signifi-

cance in light of the Court's emphasis that the First Congress 'was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument.' " *Meyers* v. *United States,* 272 U.S. 52, 174-175 (1926); *Lynch* v. *Donnelly,* 104 S.Ct. at 1359.

Congressional actions seeking to embody the religious nature of the American people are not limited to the early years of our Republic. One such recognition is the relatively recent adoption of "In God We Trust" as our national motto. *Joint Resolution to establish a National Motto of the United States,* Ch. 795, Pub. L. No. 84-851, 70 Stat. 732 (1957). The phrase is evidenced upon all coins and currency, is in our National Anthem, and is inscribed over the entrance to the Senate Chamber. *Engel* v. *Vitale,* 370 U.S. at 440, 449. Since 1954, the Pledge of Allegiance has contained the words "One nation, *under God,* with liberty and justice for all." *Joint Resolution, etc.,* Pub. L. No. 94-344, § 1(19), 90 Stat. 810, 813 (1978), codified, as amended, at 36 U.S.C. § 172 (1978).

All of the institutions of our government are permeated with such practices, including this Court. The very decorum of this Court, as well as the ornamentation of the courtroom communicates this rich heritage. Since the days of John Marshall, this Court's crier has said, "God save the United States and this Honorable Court." *See* 1 C. Warren, *The Supreme Court in United States History* 496 (1922). Indeed, "[t]he very chamber in which oral arguments on this case were heard is decorated with a notable. . . symbol of religion: Moses with the Ten Commandments." *Lynch* v. *Donnelly,* 104 S.Ct. at 1361.

It is blinking at reality to say that the practices and actions described above do not provide concrete, specific

historical evidence upon which to evaluate the constitutional validity of the Alabama statute. In light of this rich heritage of governmental benevolence towards religion, the result is inevitable. As Justice William O. Douglas instructs: "We are a religious people whose institutions presuppose a Supreme Being." *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952). The invalidation of this statute would severely contradict our history, and bring this Court into "war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion." *McCollum* v. *Board of Education*, 333 U.S. at 211-212; *Lynch* v. *Donnelly*, 104 S.Ct. at 1359.

II.

Alabama's Statutory Provision Which Permits Public School Teachers To Begin The School Day With Meditation Or Silent Prayer Merely Permits An Exercise Of The Liberty Of Conscience In Its Purest Form.

Liberty of conscience, or the freedom to believe according to the dictates of one's own conscience, is a primary philosophical tenet of both First Amendment Religion Clauses. *Wooley* v. *Maynard*, 430 U.S. 705, 714-715 (1976); *Stanley* v. *Georgia*, 394 U.S. 557, 565 (1969); *School District of Abington Township, Pa.* v. *Schempp*, 374 U.S. 203, 226 (1963); *Thomas* v. *Collins*, 323 U.S. 516, 530-531 (1944); *Prince* v. *Massachusetts*, 321 U.S. 158, 164-165 (1944); *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 642 (1942); *Jones* v. *Opelika*, 316 U.S. 584, 595 (1942) (Opinion of Reed, J.); *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940); *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1922). Concern for this liberty is central throughout all of the protections embodied in the Bill of Rights, particularly those identified by this

Court as constituting the right to privacy. It would do violence to both the letter and spirit of our Constitution to sever religious beliefs from the other freedoms of conscience that are now clearly protected in the public school environment.

In *Cantwell* v. *Connecticut*, 310 U.S. 296, the first instance wherein the Religion Clauses were made applicable against the states, this Court held that the First Amendment "embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." *Id.* at 383-384. The absolute restriction on governmental regulation of belief springs from the sentiment that "the rights of conscience are, in their nature, of peculiar delicacy, and will bear the gentlest touch of governmental hand." I *Annals of Cong.* 730 (J. Gales ed. 1834) (Statement of Rep. Daniel Carroll of Maryland during debate on August 15, 1789). *See also School District of Abington Township, Pa.* v. *Schempp*, 374 U.S. at 231 (Brennan, J., concurring).

The illimitable liberty of conscience embodied in the First Amendment, was, and still is, a point of scholarly unanimity. As Professor Giannella has written:

> The original constitutional consensus concerning religious liberty was an outgrowth of Protestant dissent and humanistic rationalism, the viewpoints that dominated the thinking of the authors of the Constitution. These two perspectives conjoined to place the individual conscience beyond the coercive power of the secular state. For the Protestant dissenter there was a Higher Power claiming his ultimate allegiance. For the rational humanist the individual was anterior to the state; in the social contract with the state he had properly reserved the right to his opinions and beliefs on matters on ultimate concern. This respect for the inviolability of conscience lies at the heart of the free exercise clause of the first amendment.

Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development—Part I*, 80 Harv. L. Rev. 1381, 1386 (1967).

Freedom to believe is not limited solely to the Free Exercise Clause. It is clear from the *Annals of Congress* that the Establishment Clause was sought primarily to protect the *individual* citizen from the predatory tendencies of a national ecclesiastical establishment in violation of his or her liberty of conscience. As this Court recently recognized in *Lynch* v. *Donnelly*, 104 S.Ct. at 1361, quoting from Justice Joseph Story:

> The real object of the First Amendment was . . . to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.

J. Story, *supra*, at 593-595. Justice Story went on to state that:

> [The First Amendment] thus cut off the means of religious persecution (the vice and pest of former ages), and of the subversion of the *rights of conscience* in matters of religion.

Id. (emphasis supplied). The principle of liberty of conscience also pervades Madison's *Memorial and Remonstrance Against Religious Assessments* and Jefferson's *Bill Establishing Religious Freedom*, and, indeed, was a central motivating factor in disestablishment, as well as religious liberty.

This freedom, *the right to believe*, also provides the foundation for numerous constitutional immunities. Such preferred freedoms as the free exercise of religion, speech, press, assembly, petition, security against search and seizures, and immunity from self-incrimination are all causally linked

with the liberty of conscience. *Thomas* v. *Collins*, 323 U.S. at 530-531). *Cf. Baird* v. *State Bar of Arizona*, 401 U.S. 1, 6 (1970); *Jones* v. *Opelika*, 316 U.S. at 595; *Bridges* v. *California*, 314 U.S. 252, 264-265 (1941). These freedoms all have their point of origin and their justification in freedom of thought. *Wooley* v. *Maynard*, 430 U.S. at 714. It is in this respect that the Alabama statute recognizes and advances free thought. This fact has been recognized by this Court:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. *They recognized the significance of man's spiritual nature*, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man. *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). *See Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965); *cf. NAACP* v. *Alabama*, 357 U.S. 449, 462 (1958).

Stanley v. *Georgia*, 394 U.S. at 564 (emphasis supplied).

It is primarily the *religious nature* of the thoughts, reflections, mediations or prayers, that are objectionable to the appellees. An eradication of religious sentiment certainly does not promote true constitutional objectives. The Establishment Clause does not mandate a regime of absolute separation between religious aspirations and secular thought. Not only would this be impracticable, it would be impossible. As this Court has noted, thought and religion both "have unity in the character's prime place because they have unity in their human sources and functionings. Heart

and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways. They cannot be altogether parted in law more than life." *Prince* v. *Massachusetts*, 321 U.S. at 164-165. It would be inapropos to so fervently protect the liberties of speech, press, assembly, and petition in the school forum, while curtailing that freedom of conscience which is their root and origin. *Cf. Tinker* v. *Des Moines Independent School District*, 393 U.S. 503, 511 (1968).

Content-based censorship of thoughts, solely because the meditation may be of religious significance does "violate both the letter and the spirit of the Constitution." *Id.* at 512. "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley* v. *Georgia*, 394 U.S., at 565. Unquestionably, "the classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' " *Tinker* v. *Des Moines Independent School District*, 393 U.S. at 512; *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967); *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960). This liberty is closely linked to the right to receive information, which is protected under the First Amendment. *Martin* v. *City of Struthers*, 319 U.S. 141, 143 (1943); *Winters* v. *New York*, 333 U.S. 507, 510 (1948); *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965); *Lamont* v. *Postmaster General*, 381 U.S. 301, 307-308 (1965) (Brennan, J., concurring); *Stanley* v. *Georgia*, 394 U.S. 557. Religious belief and speech should receive no less protection.

III.

Alabama's Statutory Provision Allowing Meditation Or Silent Prayer Is An Example Of Affirmatively Mandated Accommodation.

First Amendment neutrality *mandates* that the public school present no affront to the spiritual needs and concerns of its students. Voiding the Alabama statute would have two "chilling effects" on the First Amendment rights of students. First, it would prefer those who believe in no religion over those who believe. Second, it would subjugate the Free Exercise Clause to Establishment Clause interests,[6] thus, contradicting the original intention of the Framers of the First Amendment.

It is obvious that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach* v. *Clauson,* 343 U.S. at 313, and that those actions which are "simply a tolerable acknowledgement of beliefs widely held among the people of this country," are not *per se* an establishment of religion. *Marsh* v. *Chambers,* 103 S.Ct. at 3336. It is equally clear that the "limits of permissible state accommodation are by no means co-extensive with the noninterference mandate by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself. *See Sherbert* v. *Verner,* 374 U.S. 398, 423 (1963) (Harlan, J. dissenting); *Braunfeld* v. *Brown,* 366 U.S. 599, 608 (1961)." *Walz* v. *Tax Commission,*

[6] As Paul Kauper has written: "If the protection afforded in the name of religious freedom against a state-prescribed, non-theistic orthodoxy is that a person cannot be compelled to participate, whereas the protection afforded in the name of the establishment clause is that a person may demand that any exercise promoting theistic belief be completely eliminated, the result is that the freedom protected by the establishment clause is regarded as having a higher value than the freedom protected by the free exercise clause." Kauper, *Prayer, Public Schools and the Supreme Court,* 61 Mich.L.Rev. 1030, 1063 (1962).

397 U.S. at 673. "There is room for play in the joints productive of benevolent neutrality" towards religion. *Id.* at 669. This benevolence is mandated in the present case.

Governmental intrusion into the area of religion in contemporary society involves comparative religion, philosophy, ethics, and values clarification courses. As Giannella notes:

> Unlike . . . other areas, formal public education does not involve a pattern of regulation in which the place of religion can be derived from secular catagories . . . education directly touches upon religious concerns, such as the meaning of existence and the sources and nature of human values.

Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development—Part II, 81 Harv.L.Rev.* 513, 561 (1968).

Because of this entrance into the precinct of religion, it is constitutionally impermissible for government fanatically to seal religion from the classroom. Such a secularization would prefer nonbelief over belief. *Zorach* v. *Clauson,* 343 U.S. at 314. Moreover, the Constitution does not require "complete separation of church and state; it *affirmatively mandates accommodation,* not merely toleration, of all religions, and forbids hostility towards any." *Lynch* v. *Donnelly,* 104 S.Ct. at 1359 (emphasis supplied).

The requirement of affirmatively mandated accommodation is particularly relevant in education due to the impressionable nature of the youths involved. Just as religious indoctrination may convey—indeed inculcate—doctrines contrary to the views of the children's parents, here the placing of the governmental hand upon the shoulder of a young religious adherent for holding and expressing those views would be equally inappropriate. In the past, this

Court has sought to "sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows in the best of our traditions. . . . The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. . . . But it can close its doors or suspend its operations as to these who wish to repair to their sanctuary for worship and instruction. No more than that is undertaken here." *Zorach* v. *Clauson*, 343 U.S. at 313-314.

The school room is undoubtedly a "market place of ideas." This is the goal of the pluralism we profess. Alabama's solution, the accommodation of all creeds, while espousing none, cannot help but to further the true spirit of voluntarism, pluralism, and religious liberty. In this Republic, where large degrees of personal autonomy from governmental restraints are normative and limitations upon preferred freedoms are the exception, it is inappropriate "to impose a crabbed reading of the [religion] clauses on the country." *Lynch* v. *Donnelly*, 104 S.Ct. at 1366.

IV.

Alabama's Statutory Provision Allowing Meditation Or Silent Prayer Does Not Violate The Lemon Tripartite Test.

A. Alabama Code § 16-1-20.1 Serves Secular Educational Purposes.

In the past, this Court has found it useful to inquire 1) whether a challenged law or conduct has a secular purpose, 2) whether its principal or primary effect is to advance or inhibit religion, and 3) whether it creates an excessive en-

tanglement of government with religion. *Lemon* v. *Kurtzman*, 403 U.S. at 612-613. However, as this Court has recently noted, even where applicable, this "tripartite test" provides "no more than a helpful 'signpost' in dealing with Establishment Clause challenges." *Lynch* v. *Donnelly*, 104 S.Ct. at 1367 (O'Connor, J., concurring); *Mueller* v. *Allen*, 463 U.S. ____, ____, 103 S.Ct. 3062, 3066 (1983); *Hunt* v. *McNair*, 413 U.S. 734, 741 (1973).[7]

The first of those criterion, that the legislation or conduct have a *secular purpose*, is easily met. Undoubtedly "the definition of 'secular' here must be a generous one . . . [otherwise] . . . virtually nothing that government does would be acceptable; laws against murder for example, would be forbidden because they overlapped the fifth commandment of the Mosaic Decalogue." L. Tribe, *American Constitutional Law* 835 (1978).

Prayer is a patently religious activity. Meditation may or may not be. Used in its ordinary sense, "meditation" connotes reflection or contemplation on a subject which may be religious, irreligious, or non-religious. Because of its unique nature, a moment of silence for "meditation or prayer" permits the religious, irreligious, or non-religious content of that moment to be determined by the individual student. To a believer, it is a reasonable accommodation of religious belief. For an unbeliever, it is a moment to

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[7] In two recent cases, *Larson* v. *Valente*, 456 U.S. 228 (1982), and *Marsh* v. *Chambers*, 103 S.Ct. at 3330, this Court did not apply the *Lemon* "tests". More recently, *Lynch* v. *Donnelly* paralleled *Marsh* by closely analyzing the language, intent and history surrounding the Religion Clauses. Thus, under the rubric of both *Marsh* and *Lynch*, the *Lemon* analysis has been recognized to have a declining utility where unequivocable historical evidence mandates contrary results. In light of the volume of historical evidence available here, the *Marsh* rationale would be singularly appropriate to disposition of the present case without reference to the *Lemon* tests.

contemplate anything that he desires. Thus, the words... [meditation or silent prayer]...are capable of a reasonable construction by which the constitutional difficulties raised by the plaintiffs may be avoided. *See, e.g., Curtis* v. *Loether,* 415 U.S. 189, 192, n.6 (1974)." *Gaines* v. *Anderson,* 421 F.Supp. 337, 342 (D. Mass. 1976).

Plainly, those who do not wish to pray are free to contemplate anything they want. *Reed* v. *Van Hoven,* 237 F.Supp. 48, 56 (W. D. Mich. 1965). Because of this, there is no element of peer-pressure:

> If a student's beliefs preclude prayer in the setting of a minute of silence in a schoolroom, he may turn his mind silently toward a secular topic, or simply remain silent, without violating the statute . . . or facing the scorn or reproof of his classmates.

Gaines v. *Anderson,* 421 F.Supp at 345. *Accord,* Choper, *Religion in the Public Schools: A Proposed Constitutional Standard,* 47 Minn.L.Rev. 329, 371 (1963). Thus, the *content* of the "meditation or prayer" *may be* wholly secular, or wholly religious, depending on the individual's exercise of conscience.

An important secular interest furthered by this legislation is that of recognizing religious liberty. It is inconsistent to insist that the concept behind the Free Exercise Clause has a necessarily religious purpose. If it does, then the *Lemon* test is fatally flawed. It is obvious that the establishment of the freedom to believe or not to believe is not an establishment of religion. If this were not so, the Free Exercise Clause and the Establishment Clause would be incompatible. Such self-invalidation is a constitutional abhorrence. A moment of silence for meditation or silent prayer is a reasonable accommodation of the spiritual or non-spiritual needs of students which avoids such anom-

alies. *See, e.g.*, Note, *Religion and the Public Schools*, 20 Vand.L.Rev. 1078, 1092-93 (1967); P. Freund, *Religion and the Public Schools*, 23 (1965); Kauper, *supra;* Comment, *Accommodating Religion in the Public Schools*, 59 Neb.L.Rev. 425, 450-462 (1980).

Several other secular educational functions are more obvious. As this Court noted over two decades ago: "A quiet moment at the beginning of the day would tend to 'still the tumult of the playground and start a day of study.' " *School District of Abington Township, Pa.* v. *Schempp*, 374 U.S. at 281 and n. 57 (1963) (Brennan, J., concurring). Furthermore, the legislature could reasonably believe that students tend to learn greater self-discipline and respect for the authority of a teacher from a required moment of silence. *Gaines* v. *Anderson*, 421 F.Supp. at 342. Surely, it is consistent with the public schools secular educational goals to encourage students to turn silently towards serious thoughts and values. *Id.* at 343.

Another secular purpose also exists. It is that purpose which is analogous to "those governmental acknowledgements of religion [which] serve, in the only ways reasonably possible in our culture, the legitimate secular purpose of solemnizing public occasions, expressing confidence in the future, and encouraging recognition of what is worthy of appreciation in society." *Lynch* v. *Donnelly*, 104 S.Ct. at 1369 (O'Connor, J., concurring). *Accord, School District of Abington Township, Pa.* v. *Schempp*, 374 U.S. 203. Such a recognition of our religious-cultural heritage is clearly a legitimate educational goal.

B. Any Advancement Of Religion By A Moment Of Silence Is Merely *De Minimus* And Incidental.

A moment of silence provides no opportunity for inculcation or indoctrination. The entire exercise is *content*

neutral and *uniquely voluntary*. It does not have the primary effect of advancing a state religion, or religion in general. It is neutral as between belief and non-belief. It coerces no one. Providing a forum for an exchange of ideas or silence "does not confer any imprimatur of state approval on religious sects or practices."[8] *Widmar* v. *Vincent*, 454 U.S. 263, 274 (1981). It fosters religious freedom. As Justice Brennan has noted: "It has not been shown that...the observance of a moment of silence at the opening of class, may not adequately serve...solely secular purposes... without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government." *School District of Abington Township, Pa.* v. *Schempp*, 374 U.S. at 281. Any reverent attitude which would prevail during the silent period would be merely incidental to the secular purpose of the quieting of the students. Note, *Supra*, 20 Vand. L.Rev. 1078 (1967).

C. There Is No Entanglement Issue Presented Here.

The entanglement prong of the *Lemon* "test" is inappropriate here. The entanglement "test" was uniquely adopted in the instances where administrative entanglements or political divisiveness arise. *Lynch* v. *Donnelly*, VJD *S.Ct.* at 1364-1365. Because there are no such entanglements in this case, it is inappropriate to use it in this analysis. In addi-

[8] The imprimatur of state approval or disapproval is particularly relevant in this case because of certain *findings of fact* made at the trial court level. In the companion case, *Jaffree* v. *Board of School Commissioners of Mobile County*, 554 F. Supp. 1104 (S.D. Ala. 1983), specific *findings of fact* were made that a state religion was being established in Alabama schools. The trial court found that a "religion of secularism"—secular humanism—was being promoted through the organs of the state. *See Id.* at 1129-1130, n. 41. *Cf. Torcaso* v. *Watkins*, 367 U.S. 488, 495, n. 11 (1961). Clearly such indoctrination is improper.

tion, it should be noted that a unique barrier stands between the state and religion in this instance—*silence*. In a very real way, the individual religious adherent is insulated by silence from intrusion. Entanglements are impossible because of the nature of this exercise.

CONCLUSION

Clearly, "[t]he purpose of the establishment clause was not to extirpate religion from public life." Comment, *Secularism in the Law: The Religion of Secular Humanism*, 8 Ohio N.U.L.Rev. 329 (1981). The mind frame of those who directed the constitutional era and the drive toward separation of church and state "was, in some respects, anticlerical, as a result of Papism, Cromwellism, etc., but never antireligious, so that some interrelating and intermeshing of state and religion have always been with us." Forkosch, *Religion, Education, and the Constitution—A Middle Way*, 23 Loyola L.Rev. 617 632 (1977).

The Framers sought to avoid the kind of hostility found in this case by accommodating the religious interests of the people. There was no intention on the part of the Framers to censor or eradicate religion from education. And such has never occurred. The rule of separation that the Framers had in mind when they drafted the First Amendment was to be implemented in a climate of accommodation and benevolence, not of hostility toward religion.

Appellees reasoning runs contrary to this central historical and political truth. Such reasoning amounts to a *de facto* establishment of what this Court has previously identified as a "religion of secularism," *School District of Abington Township* v. *Schempp*, 374 U.S. at 225, which seeks fervently to eradicate all mention of religion from public life. *See also Giannella, supra*, 81 Harv.L.Rev. at

586-587 and *Torcaso* v. *Watkins*, 376 U.S. at 495, n. 11. As Harvard professor Harvey Cox has noted, secularism is an "ideology, a new closed world view which functions very much like a new religion. . . . It is a closed ism." H. Cox, *The Secular City* 18 (1965). "It is a menace to freedom because it seeks to impose its ideology through the organs of the State." *Id.*

Here, the State of Alabama did nothing more than accommodate in neutral fashion the cultural-historical-religious elements of America's past and present. As Kauper has noted, by way of such accommodation governments are "contributing to religious freedom and making it more meaningful." P. Kauper, *Civil Liberties and the Constitution* 10 (1962).

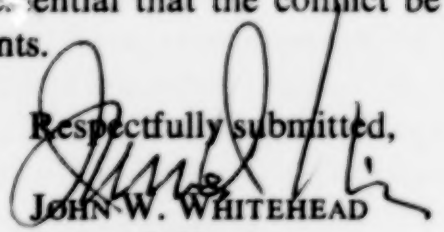
When the people of Alabama ratified their Constitution, they echoed the religious beliefs of the Framers of the Federal Constitution. In their preamble they proclaimed:

> We, the people of the State of Alabama, in order to establish justice, insure domestic tranquility, and secure the blessings of liberty to ourselves and our posterity, invoking the favor and guidance of Almighty God, do ordain and establish the following Constitution and form of government for the State of Alabama.

Ala. Const. of 1901, Preamble, Ala. Code, Vol. 1. In ratifying the Bill of Rights, their descendants never imagined that one day the United States Constitution could be argued in such a manner as to limit the display of the faith they proclaimed, much less prohibit a moment of silence in their public schools.

It is, therefore, essential that the conflict be resolved in favor of the appellants.

Respectfully submitted,



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Nos. 83-812 and 83-929

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WALLACE, *et al.*,

Appellants

v.

JAFFREE, *et al.*,

Appellees

and

SMITH, *et al.*,

Appellants

v.

JAFFREE, *et al.*,

Appellees

Appeal from the United States Court of Appeals for the Eleventh Circuit

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QUESTION PRESENTED

1. Whether a state statute which permits teachers in public schools to observe a short period of silence for meditation or voluntary prayer has the predominant effect of advancing students' liberty of religion and of mind rather than any effect of establishing a religion.

THE PARTIES

The appellants in the Court of Appeals in both cases were: Ishmael Jaffree, Jamael Aakki Jaffree, Makeba Green, and Chioke Saleem Jaffree, infants by and through their best of friend and father, Ishmael Jaffree.

The appellees in the Court of Appeals who are now appellants in 83-812 are: George Wallace in his official capacities as Governor of the State of Alabama and ex officio member of the State Board of Education; Charles Graddick, in his official capacity as Attorney General for the State of Alabama; John Tyson, Jr., Ron Creel, S.A. Cherry, Ralph Higgenbotham, Victor P. Poole, Harold C. Martin, James B. Allen, Jr., and Roscoe Roberts, Jr., in their official capacities as members of the Alabama State Board of Education.

The Intervenor-Appellees in the Court of Appeals who are now appellants in 83-929 numbered approximately six hundred individuals. They have been designated in lower Court documents as "Douglas T. Smith, et al." and are listed in their brief.

Appellees in a companion case in the Court of Appeals applied for certiorari in 83-7047, which was denied on April 2, 1984. They were as follows: the Board of School Commissioners of Mobile County; Dan C. Alexander, Dr. Norman Berger, Hiram Bosarge, Norman G. Cox, Ruth F. Drago, and Dr. Robert Gilliard, in their official capacities as members of the Board of School Commissioners of Mobile County; Dr. Abe L. Hammons, in his official capacity as Superintendent of the Board of Education of Mobile County; Annie Bell Phillips, individually and in her official capacity as principal of Morningside Elementary School; Julia Green, individually and in her official capacity as a teacher at Morningside Elementary School; Betty Lee, individually and in her official capacity as principal of E.R. Dickson Elementary School; Charlene Boyd, individually and in her official capacity as a teacher

at E.R. Dickson Elementary School; Emma Reed, individually and in her official capacity as principal of Craighead Elementary School; Pixie Alexander, individually and in her official capacity as a teacher at Craighead Elementary School.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 83-812 and 83-929

WALLACE, *et al.*,

Appellants

v.

JAFFREE, *et al.*,

Appellees

and

SMITH, *et al.*,

Appellants

v.

JAFFREE, *et al.*,

Appellees

Appeal from the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF APPELLANT, GEORGE C. WALLACE

OPINIONS BELOW

The opinion of a panel of the U.S. Court of Appeals for the Eleventh Circuit, dated May 12, 1983, is reported at 705 F.2d 1526 (1983) and set out at J.S. 1a.* A dissenting opinion to the denial of a rehearing en banc in

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* J.S. refers to appendix to Jurisdictional Statement.

J.A. refers to the Joint Appendix.

A. refers to a separate appendix to Appellant's Brief.

the Eleventh Circuit, dated August 15, 1983, is reported at 713 F.2d 614 (1983) and set out at J.S. 1b.

The opinions of the district court in the two cases (later consolidated on appeal) dated January 14, 1983, are reported at 554 F. Supp. 1104 (1983) and 554 F. Supp. 1130 (1983) and are set out at J.S. 1d and J.S. 56d. An opinion by the district court, accompanying a preliminary injunction, dated August 9, 1982, is reported at 544 F. Supp. 727 (1982) and also set out at J.S. 64d. An opinion accompanying a stay order issued by Justice Powell, acting as Circuit Judge, is reported at —— U.S. ——, 103 S.Ct. 842 (1983) and set out as J.S. 1e.

JURISDICTION

The opinion of the U.S. Court of Appeals for the Eleventh Circuit was entered on May 12, 1983. The Court of Appeals denied a petition for a rehearing en banc on August 15, 1983. Notice of appeal was filed on September 26, 1983, J.S. 1f. The Appeal was docketed on November 14, 1983. The jurisdiction of the Court rests on 28 U.S.C. § 1254(2).

STATUTE INVOLVED

Alabama Code § 16-1-20.1 (1982):

> "At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in."

CONSTITUTIONAL PROVISIONS

AMENDMENT I (in pertinent part)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;

AMENDMENT XIV (in pertinent part)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Ishmael Jaffree, on behalf of three of his minor children, filed suit in the U.S. District Court on May 28, 1982, seeking declaratory and injunctive relief against his children's public school teachers who regularly led their students in vocal classroom prayer. The teachers' activity was not pursuant to any state statute or school policy. There was at the time an Alabama statute which provides teachers "may announce . . . a period of silence not to exceed one minute in duration . . . for meditation or voluntary prayer." Alabama Code § 16-1-20.1 (1982). The plaintiffs did not initially challenge this statute. After plaintiffs filed suit, the Alabama legislature passed another statute, which provides teachers "may lead willing students in a prayer" which is set out in the statute. Alabama Code § 16-1-20.2 (former Alabama Act 82-735). In a second amended complaint adding the Governor of Alabama, the attorney general, and other state education authorities, Jaffree challenged the constitutionality of both statutes.

The district court severed Jaffree's complaint into two causes of action: one related to those teachers' activities unmotivated by the statutes, and the other related to the statutes. Following the severance, the court issued a preliminary injunction against the implementation of the Alabama school prayer statutes. *Jaffree By and Through Jaffree v. James*, 544 F.Supp. 727 (S.D. Ala., 1982) (J.S. 64d). After trial on the merits, the district court dismissed both actions, thereby dissolving the preliminary injunction. *Jaffree v. Board of School Commissioners of Mobile County*, 554 F.Supp. 1104 (S.D. Ala., 1983) (J.S. 1d). *Jaffree v. James*, 554 F.Supp. 1130 (SD. Ala., 1983 (J.S. 56d). Pending appeal, Jaffree filed an emergency motion for stay and injunction in the Eleventh Circuit Court of Appeals, which was denied (J.S. 1c). Jaffree requested Justice Powell, in his capacity as Eleventh Circuit Justice, to stay the trial court's order or reinstate the preliminary injunction previously issued by the district court. In a memorandum opinion, Justice Powell granted the stay and reinstated the injunction pending final disposition of the appeal in this case (J.S. 1e).

On appeal, the Eleventh Circuit Court of Appeals consolidated the two cases, reversed the district court's dismissal of the actions, declared both statutes and the teacher-initiated prayer activity unconstitutional and directed the district court to enjoin both statutes and the teacher activity (J.S. 1a). A petition for rehearing was denied, with four judges dissenting from the denial (J.S. 1b). On October 14, 1983, the district court entered an injunction against the statutes and the teaching activity.

Your appellants sought review in this Court of both statutes declared unconstitutional. On April 2, 1984, this Court affirmed the judgment of the Court of Appeals regarding Ala. Code § 16-1-20.2, a statute specifying that a particular prayer was authorized to be said in all Ala-

bama schools. This Court noted probable jurisdiction as to the second Alabama statute, Ala. Code § 16-1-20.1, which provides that a public school teacher may provide up to one "minute of silence for meditation or voluntary prayer."

SUMMARY OF ARGUMENT

This Court has indicated that, read together, the Religion Clauses require certain accommodations and permit others that may not be required. The three-part, purpose-effect-entanglement test, if rigidly applied without reference to other relevant factors, forecloses virtually every accommodation of religion. While another lower federal court has upheld a statute almost identical to Alabama's meditation-or-voluntary prayer statute pursuant to the three-part test, this type of statute is best understood as a permissible accommodation of religion. Viewed in terms of permissible accommodations, or even in terms of the three-part test, Alabama's meditation-or-voluntary prayer statute conforms to acceptable constitutional criteria.

1. Nothing the Court said in *Engel v. Vitale*, 370 U.S. 421 (1962), or *Abington School District v. Schempp*, 374 U.S. 203 (1963), indicates that providing a period of silence for public school children in which they may meditate, pray, or—if they choose—daydream in any way offends the Constitution. Such a statute avoids the evils which concerned the Court in those cases because the statute 1) neither prescribes prayer; 2) nor affirms religious belief; 3) nor coerces any religious exercise. Rather the statute implements the very type of "wholesome neutrality" prescribed in *Engel*.

The Eleventh Circuit Court of Appeals, which struck down Alabama's meditation-or-voluntary prayer statute, and other courts which have struck down other moment-of-silence statutes, have done so primarily on the basis that they violate the "purpose" prong of the three-part test. In doing so these courts have looked to the fact that the statute mentions the word "prayer" and to possible "motivations" of some of the statute's sponsors. They

have thereby over-extended the logic of the three-part test, a tendency which indicates the limited usefulness of the test.

2. In answering whether Alabama's meditation-or-voluntary prayer statute is a permissible accommodation of religion, it is well to measure the statute against the historical record. While these statutes themselves are of recent origin, we discuss at length in the body of the argument hitherto undeveloped facts demonstrating that Congress, in providing for the establishment of the public school systems in the land-grant states, explicitly sought to promote religion. By comparison, Alabama's meditation-or-voluntary prayer statute is a modest accommodation of religion. If it was not unconstitutional for Congress to have acted as it did, it would hardly seem that Alabama's statute could be considered unconstitutional.

3. The purpose of the Religion Clauses, read together, "is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which receive the best hope of attainment of that end." *Abington School District v. Schempp*, 374 U.S. 203, 305 (Goldberg, J., Concurring).

The logic of strict separation as applied by the lower federal courts has become hostile to the individually initiated attempts of students to exercise their religious liberty. Some lower federal courts have gone to the point of directing school administrators to prevent student-initiated prayer even outside the classroom. Administrators, fearing civil liability, have gone even further in suppressing the religious exercise of students as demonstrated by examples given in the full argument.

A coherent interpretation of the Religion clauses, which emphasizes accommodation, is necessary to reverse the erosion of the Free Exercise Clause. Alabama's meditation-or-voluntary prayer statute is the appropriate vehicle to do so because, while it may be viewed as present-

ing either an Establishment issue or a Free Exercise issue, it presents a more generalized Religion Clause issue.

ARGUMENT

A. The Eleventh Circuit Court Of Appeals Erred In Holding That Alabama's Meditation-Or-Voluntary-Prayer Statute Violates The Establishment Clause.

1. *The School Prayer Cases. Engel v. Vitale*, 370 U.S. 421 (1962), declared the prayer composed by the New York State Board of Regents a violation of the Establishment Clause for reasons which simply do not apply to a meditation-or-voluntary-prayer statute.[1] Justice Black's

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[1] The term "meditation-or-voluntary prayer" is used to describe the Alabama statute. The term "moment-of-silence" statute has been used as a generic term to categorize a variety of state statutes, including Alabama's, which provide periods of silence. *See generally* Note, "Daily Moments of Silence in Public Schools: A Constitutional Analysis," 58 N.Y.U. L. Rev. 364, (1983) and Note, "The Unconstitutionality of State Statutes Authorizing Moments of Silence in Public Schools," 96 Harv. L. Rev. 1874 (1983).

The following state statutes relate to moments of silence: Alabama, see Ala. Code § 16-1-20.1 (Supp. 1983); Arizona, see Ariz. Rev. Stat. Ann. § 15-522 (Special pamphlet 1983); Arkansas, see Ark. Stat. Ann. § 80-1607.1 (1980); Connecticut, see Conn. Gen. Stat. Ann. § 10-16a (West Supp. 1984); Florida, see Fla. Stat. Ann. § 233.062 (West Supp. 1984); Georgia, see Ga. Code Ann. § 20-a-1050 (1982); Illinois, see Ill. Ann. Stat. ch. 122, para. 771 (Smith-Hurd Supp. 1983-1984); Indiana, see Ind. Code Ann. § 20-10.1-7-11 (Burns Supp. 1983); Kansas, see Kan. Stat. Ann. § 72-5308a (1980); Louisiana, see La. Rev. Stat. Ann. § 17:2115(a) (West 1982); Maine, see Me. Rev. Stat. Ann., Tit. 20-A § 4805 (West 1983); Maryland, see Md. Educ. Code Ann. § 7-104 (1978); Massachusetts, see Mass. Gen. Laws Ann., ch. 71, § 1A (Supp. 1984); Michigan, see Mich. Comp. Laws Ann. § 380.1565 (West Supp. 1984-1985); New Jersey, see N.J. Stat. Ann. § 18a:36-4 (West Supp. 1983-1984); New Mexico, see N.M. Stat. Ann. § 22-5-4.1 (1981); New York, see N.Y. Educ. Law § 3029-a (McKinney 1981); North Dakota, see N.D. Cent. Code Ann. § 15-47-30.1 (1981); Ohio, see Ohio Rev. Code Ann. § 3313.60.1 (Page 1980); Pennsylvania, see Pa. Stat. Ann. Tit. 24, § 15-1516.1 (Purdon Supp. 1984-

opinion for the majority emphasized the elements of the Establishment Clause violation as follows: (1) the state "is without power to prescribe by law any particular form of prayer. . ."; *Id.* at 430; (2) by doing so, the state "establishes the religious beliefs embodied in the Regents' prayer." *Id.*; (3) although non-denominational and voluntary, the Regents' prayer involves "indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion." *Id.* at 431. To the contrary, a meditation-or-voluntary-prayer statute: (1) neither prescribes nor proscribes prayer at all, much less a particular prayer; (2) neither affirms nor denies religious belief, much less a particular religious belief; and (3) coerces only silence on the part of all in the class.

Abington School District v. Schempp, 374 U.S. 203 (1963), in which reading from the Bible and recitation of the Lord's prayer in public school were declared unconstitutional, addressed "religious exercises," that had been "prescribed as part of the curricular activities," "held in the school buildings under the supervision and with the participation of teachers employed in those schools." 374 U.S. at 223. Resting "on a theory not advanced in *Engel*," the case emphasizes "wholesome neutrality" "as the central thesis for interpreting the establishment clause."[2] Not only does the meditation-or-voluntary-prayer statute not prescribe any religious exercises, as already noted; but it advances the very "wholesome neutrality" central to *Engel*.

At the time *Engel* and *Schempp* were decided, it appeared beyond serious question that a statute providing for a moment of silence was perfectly consistent with

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1985); Rhode Island, see R.I. Gen. Laws § 16-12-3.1 (1981); Tennessee, see Tenn. Code Ann. § 49-6-1004 (1983); Virginia, see Va. Code Ann. § 22.1-203 (1980).

[2] Kauper, *Religion and the Constitution* 64-65 (1964).

the Constitution. In *Schempp*, Justice Brennan implied that such a statute would not transcend the Constitution. 374 U.S. 281 and n.57 (Brennan, J., concurring).[3] Justice Brennan cited an article published the previous year by Professor Choper, which observed:

> Since each student could utilize this moment of silence for any purpose he saw fit, the activity may not be fairly characterized as solely religious, and since no student would really know the subject of his classmates' reflections, no one could in any way be compelled to alter his thoughts.[4]

Two other prominent scholars, Professors Kauper and Freund, writing in the sixties, noted briefly, as if there were not much question, that such statutes would be constitutional.[5] More recently, Professor Tribe has also affirmed the constitutionality of such statutes.[6]

2. *The Three-Part Test.* Although it may be terribly difficult to implement even a short period of silence in some of today's turbulent classrooms,[7] the necessity for

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[3] Appellants do not presume that Justice Brennan is bound by his prior statement nor that the Justice(s) might not distinguish between a moment-of-silence statute without the word prayer and Alabama's meditation-or-voluntary-prayer statute.

[4] Choper, "Religion in the Public Schools: A Proposed Constitutional Standard," 47 *Minn. L. Rev.* 329, 371 (1963).

[5] Kauper, "Prayer, Public Schools and the Supreme Court," 61 *Mich. L. Rev.* 1031, 1041 (1963); Freund, "The Legal Issue" in *Religion and The Public Schools* 23 (1965).

Freund states: "Nor does any decision, in my judgment, prevent a public school class from engaging in a moment of silent meditation or reverence, as the teachings of the individual spirit or inheritance may prompt." "The Legal Issue" at 23.

[6] L. Tribe, *American Constitutional Law* § 14-6 at 829 (1978).

[7] "In too many schools across the land, teachers can't teach because they lack the authority to make students take tests, hand in homework, *or even quiet down their class.*" President Ronald

periods of silence in any learning environment would seem to be self-evident. *See Disorder in Our Public Schools* at 3 (Jan. 9, 1984) (A White House Paper by the Depts. of Education and Justice and the Office of Management and Budget); See also *National Commission on Excellence in Education*, April, 1983. Nevertheless, four of the five lower courts to rule on moment-of-silence statutes have found that such statutes violate the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), according to which governmental action (1) "must have a secular legislative purpose;" (2) must have a "principal or primary effect . . . . that neither advances nor inhibits religion" and (3) "must not foster 'an excessive government entanglement with religion.'" *Id.* at 612-13.

Those courts which have ruled the moment-of-silence statutes unconstitutional have done so if *any* of its purposes might be characterized as religious, rather than inquiring whether any of the purposes might be characterized as secular. One case conceded "that a moment of silence in and of itself is nondiscriminatory and may serve a secular purpose in aid of the educative function", *Beck v. McElrath*, 548 F. Supp. 1161, 1163 (M.D. Tenn., 1982) appeal dismissed, vacated and remanded, 718 F.2d 1098 (6th Cir. 1983), but nevertheless found the statute failed the secular purpose part of the three-part test because "the legislative purpose was advancement of religious exercises in the classroom." *Id.* In another case, inclusion of the word "prayer" was deemed sufficient to negate a secular purpose. *Duffy v. Las Cruces Public Schools*, 557 F. Supp. 1013, 1015 (D.N.M., 1983). Even in the case of a state statute that did not include any reference to "prayer," the district court nevertheless found the purpose religious, dismissing the "omission of the word 'prayer' [as] a cosmetic change only, having no substantial effect", *May v. Cooperman*,

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Reagan at the National Forum on Excellence in Education, Indianapolis, Dec. 8, 1983 (emphasis added).

572 F. Supp. 1561, 1574 (D.N.J., 1983). In this case, the only Federal Court of Appeals yet to render an opinion that addresses the issue disposed of the issue in one paragraph which found a legislator's motive and the word "prayer" sufficient to invalidate the statute. (J.S. 18a).[8]

Whereas the statements of Justice Brennan in *Schempp* and of several prominent legal scholars suggest the unquestionable constitutionality of moment-of-silence statutes, a few lower court judges less steeped in the Religion Clause cases, have preemptorily concluded otherwise. The difficulty of reconciling this Court's decisions under the Religion Clauses probably inclines lower court judges to adopt a seemingly simple and safe—because respectable—approach of ruling against anything possibly connected to religion. In doing so, they fail to appreciate that "the Establishment Clause . . . is not a precise, detailed provision in a legal code capable of ready application." *Lynch v. Donnelly*, —— U.S. ——, 104 S.Ct. 1355, 1361-62. The result, which is condemned in *Lynch*, is that of "mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general . . ." 104 S.Ct. at 1361

Among many difficulties with the three-part test, the principal problems stem from the *purpose* prong.[9] The source of the major difficulty can be demonstrated by comparing the statement regarding "purpose" as it finally emerged in *Lemon*, 403 U.S. at 612-13, with its beginning in *Schempp*:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the *advancement or inhibition of reli-*

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[8] The attorney representing the Alabama Department of Education briefed and orally argued before the Eleventh Circuit only for the constitutionality of the meditation-or-voluntary-prayer statute, as distinguished from the state-composed-prayer statute.

[9] See Choper, "The Religion Clauses of the First Amendment: Reconciling the Conflict" 41 U. of Pitt. L. Rev. 673, 685 (1980).

> *gion* then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause *there must be a secular legislative purpose* and a primary effect that neither advances nor inhibits religion. 374 U.S. 222 (emphasis added)

Whereas it may be clear to nearly all that the purpose of a moment of silence is not "the advancement or inhibition of religion," others may disagree whether there is a clearly-demonstrated "secular purpose." Although *Schempp* states the purpose prong in alternate formulations that are intended to equate with one another, later statements of the test do not. As currently stated, the purpose test puts the burden on the defenders of the statute in such a way as to rule out any attempt to accommodate religion, even one required by the Free Exercise Clause. See *Sherbert v. Verner*, 374 U.S. 398 (1963).

Although the statement of the test in *Schempp* might be ambiguous because of the alternate phrasing, the current statement is also ambiguous because it depends on the interpretation of the word "secular." If taken literally, the "secular purpose" prong "would make virtually *all* accommodations for religion unconstitutional." [10] "[I]f a purpose were to be classified as non-secular simply because it coincided with the beliefs of one religion or took its origin from another, virtually nothing that government does would be acceptable . . . ." [11] Not surprisingly, therefore, this Court has invalidated only two statutes primarily under the purpose prong of the three-part test. See *Epperson v. Arkansas*, 393 U.S. 97 (1968), holding unconstitutional a state statute prohibiting the teaching of evolution; *Stone v. Graham*, 449 U.S. 39 (1980), holding unconstitutional a state statute requiring the posting of the Ten Commandments in public school classrooms. The Court has refused "to construe the Reli-

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[10] *Id.*

[11] Tribe, *supra*, n. 6 at 835.

gion Clauses with a literalness that would undermine the ultimate constitutional objective *as illuminated by history.*" *Lynch*, 104 S.Ct. at 1361, citing *Walz v. Tax Commission*, 397 U.S. 664, 671 (1979) (emphasis supplied in *Lynch.*)

Despite the fact that this Court has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area . . ." *Lynch*, 104 S.Ct. at 1362, citing *Tilton v. Richardson*, 403 U.S. 672, 677-678; *Com. for Public Education v. Nyquist*, 413 U.S. 756, 1773 (1973), some lower courts have not only rigidly adhered to the test but, as in the case of moment-of-silence statutes, expanded the test at the expense of the Free Exercise Clause. Such a searching for religious motives distorts the three-part test and demonstrates hostility to religion. Although this Court has applied a "strict scrutiny" test to the Establishment Clause, *Larson v. Valente*, 456 U.S. 228 (1982), it has done so in the context of a state statute that imposed onerous legal obligations on some religions but not on others, a situation not applicable in this case. More generally, this Court has been "reluctan[t] to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute." *Mueller v. Allen*, —— U.S. ——, 103 S.Ct. 3062, 3066 (1983). To say a statute is unconstitutional *if it does not have a secular purpose* is significantly different from saying it is unconstitutional *if it has any religious purpose.* The latter approach creates the impression that a religious purpose is an unconstitutional purpose. A search for religious purpose subtly shifts toward a process of rooting out religiously motivated action.[12]

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[12] *McRae v. Califano*, 491 F.Supp. 630, 741 (E.D. N.Y., 1980), in which a district court declared Congressional limits on abortion funding unconstitutional, rejected an Establishment Clause claim based on the alleged lack of a secular purpose even while recognizing the religious sponsorship of the legislation. This Court, in reversing, also rejected the Establishment Clause claim without

Although distortions fostered by focusing on "motive" may not be apparent to a lower court considering only a single statute, the dilemma for this Court dealing with similar statutes from different legislatures becomes quite clear. In *Gaines v. Anderson*, 421 F. Supp. 337 (D.Mass., 1976), the three-judge court found that the legislative history and the statutory language demonstrated a secular purpose. 421 F. Supp. at 341. The language of the Massachusetts statute and the Alabama statute are virtually identical, although Alabama's employs slightly more permissive language.[13] The Eleventh Circuit, however, invalidated the Alabama statute because "the intent of this statute was to return prayer to public schools." J. S. 18a. Senator Holmes, the bill's author, testified that his purpose in sponsoring § 16-1-20.1 was "to return voluntary prayer to the public schools." He intended to provide children "the opportunity of sharing in their spiritual heritage of Alabama and of this country." J.A. 50. See also the Alabama Senate Journal 921 (1981). J.A. 67. (P-3 adm. T. 73) Assuming arguendo that Senator Holmes had no other *motive*, which we do not concede,[14] we submit that the constitutionality of identically worded statutes should not turn on the vagaries of motives from one legislature to another.[15]

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inquiring into the motive or purpose but by focusing only on the effect. *Harris v. McRae*, 448 U.S. 297 (1980). Even the district court in *McRae*, however, recognized that the consequences of equating a finding of the sponsors' religious motivation with a violation of the Establishment Clause would be to preclude religious leaders from participation in the political process because they would fear their support for a bill would guarantee a declaration of unconstitutionality. 491 F.Supp. at 741.

[13] The Massachusetts statute was mandatory on the teacher, see 421 F.Supp. at 340, n. 4, whereas Alabama's is not.

[14] While Senator Holmes, a non-lawyer, stated he had "no other purpose" than to restore *voluntary* prayer, T. 65 (J.A. 52), he also stated that he intended to clarify the right of students to pray on their own. T. 68 (J.A. 54).

[15] In *May v. Cooperman*, the Court noted that the American Baptist Churches of New Jersey had opposed the moment-of-

Moreover, what another court has construed to be an attempt "to evade *Engel* and *Abington Township*," *May v. Cooperman*, 572 F. Supp. at 1572 (1983), may only have been a genuine attempt to fit within the often conflicting constitutional tests under the Free Exercise and Establishment Clauses. At the time Senator Holmes sponsored the Alabama statute, the only Court to have ruled had declared the wording that he employed to be constitutional. *Gaines v. Anderson*, *supra*. Indeed, the leading constitutional hornbook, relying on *Gaines*, matter-of-factly has stated such statutes are constitutional. Tribe, *Constitutional Law*, § 14-6, at 829 (1978). It would have appeared in 1981 to most, except those simply opposed to any public act even remotely connected with religion, that the Alabama statute was constitutional. Although certain lower courts have since disagreed, there appears to have been a preconception on their part that a possible religious motivation precludes any other motivation. Not only does such a one-dimensional view of human nature naively ignore the various political motivations of elected officials, more significantly it assumes the inconsistency of religious motivation and a concern for constitutional government The absurdity of this implicit assumption is apparent when applied to the motivations of those responsible for the First Amendment itself.

Certain lower courts, to apply the words of Justice (then Judge) Cardozo, have pressed the three-part test beyond "the limits of its logic." [16] Although the secular purpose of the statute has been defended in *Gaines*, we consider such an approach to obscure the analysis and only to exacerbate the misconceptions that persist among

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silence statute on religious grounds. 572 F.Supp. at 1565. If, in a subsequent legislative session, the Baptist Churches had successfully sponsored legislation repealing the moment-of-silence statute, the repeal would be subject to challenge due to the *motives* of the sponsors under the court's analysis.

[16] Cardozo, *The Nature of the Judicial Process* 49 (1921).

some of the lower courts. The lower courts need clearer guidance on the limits of separation which, as discussed below, can only be achieved by construing the Religion Clauses together as part of a clearly conceived and articulated theory of accommodation. With Professor Paul Freund, we believe that this Court's decision on moment-of-silence statutes will turn, not on particular tests, but upon this Court's conceptualization of the issue as either one of Establishment or Free Exercise.[17]

If the three-part test is to continue in use it should be modified in one of several possible ways. Our statement of the issue, which assumes a reading of the Free Exercise and Establishment Clauses together, considers whether the government's action has a "predominant effect" that advances Free Exercise. This suggestion is similar in some respects to Dean Choper's suggestion of a test that would forbid government action whose purpose is "solely religious" and that is likely to impair religious freedom by coercing, compromising, or influencing religious beliefs.[18] Professor Tribe has also suggested upholding any action that is "arguably non-religious."[19]

B. Alabama's Meditation-Or-Voluntary-Prayer Statute Represents A Modest Accommodation Of Religion Consistent With Past Congressional Provisions For Public Education In The Land-Grant States.

"The Enabling Act of each of the public-land States admitted into the Union since 1802 has included grants of designated sections of federal lands for the purpose of supporting public schools." *Andrus v. Utah*, 446 U.S. 500, 506 (1980) (footnote omitted). These acts were based on the admission of Ohio in 1802-1803, whereby

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[17] Freund, "Storms Over the Supreme Court," 69 A.B.A.J. 1474, 1480 (Oct. 1983).

[18] Choper, *supra*, n. 4 at 330.

[19] Tribe, *supra*, n. 6 at 831.

"Congress enacted a compromise drawn from the Land Ordinance of 1785 and the Northwest Ordinance of 1787. . . . [which] set a pattern followed in the admission of virtually every other state." *Id.* at 522 (Powell, J., dissenting) (footnotes omitted).

In these organic acts related to the Northwest Territory, Congress promoted religion as an integral part of public education. Following the Ordinance of 1784 regarding territorial government,[20] the Continental Congress in the Land Ordinance of 1785 "reserved the lot No. 16, of every township . . .," Ordinance of May 20, 1785, 1 Laws of the United States 563, 565, (1815) (A. 8a, 12a-13a). At the same time, the Act reserved Sections 8, 11, 26, and 29 to the United States. *Id.* An earlier draft specified the section adjoining Section 16 in each township be reserved "for the support of religion . . . . to be applied forever according to the *will of the majority* of male residents . . ." 28 Journal of the Continental Congress, 251, 255 (Library of Congress ed. 1933) (emphasis added) (A. 1a, 5a). Although the Land Ordinance as enacted did not contain that provision, subsequent acts pursuant to the Act did reserve lot No. 29 "for purposes of religion." The Northwest Ordinance itself, enacted July 13, 1787, did relate religion and public schools in the same article:

> Art. 3. Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. Ordinance of July 13, 1787,

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[20] The Ordinance of 1784, which was never actually implemented, resulted from the report of a committee chaired by Thomas Jefferson. Historians dispute the extent of Jefferson's influence on the Act. The 1784 Ordinance was repealed by the Ordinance of 1787, which has been characterized as an extension and replacement, rather than a repudiation of the Ordinance of 1784. *See* R. Berkhofer, "Jefferson, The Ordinance of 1784 and the Origins of the American Territorial System" 29 *William and Mary Quarterly* 231 n. 1, 261 (1972).

> 1 Laws of the United States, 475, 479, (1815); Laws of the United States—Relating to the Public Lands, 356, 360, No. 32 (1828) (A. 21a, 26a-27a).

Then on July 23, 1787, acting pursuant to the Land Ordinance of 1785, Congress specified that Section 29 would be used for *purposes of religion* but did not make any reference to the "will of the majority":

> The lot No. 16, in each township or fractional part of a township, to be given perpetually for the purposes contained in the said ordinance. *The lot No. 29,** in each township or fractional part of a township, *to be given perpetually for the purposes of religion.* (emphasis added) Powers to the Board of Treasury to contract for the sale of Western Territory, 1 Laws of the United States 573 (1815); Laws of the United States—Relating to the Public Lands 362, No. 33 (1828) (A. 33a).

The Continental Congress pursued this same policy in other acts relating to the territories. In September, 1788, noting that certain acts previously passed had "omitted making any grants of land for Supporting Religion and for Schools of education as had been done in the Sales of Land in the western territory," the Congress resolved that tracts be set aside "forever to the sole and only use of Supporting the ministry of Religion in such Village, and the other of said tracts to remain in a like manner for supporting Schools of education . . ." 34 Journal of the Continental Congress, 540, 541-542 (Library of Congress ed., 1933).[21] (A. 43a, 44a). On September 3, 1788,

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* An editorial note in the 1815 compilation states: "This grant of No. 29, for religious purposes, is confined to the Ohio Company's purchase and to John Cleves Symmes' patent." 1 Laws of the United States 573 (1815).

[21] This resolution refers back to the Acts of Congress from June 20, 1788, and August 29, 1788. In later compilations of laws, the Act of June 20, 1788, does reflect this reservation of Section 29 "for purposes of religion." 1 Laws of the United States 580, 581

the Congress voted land to the "United Brethren, or the Society of the said Brethren for *propagating the Gospel among the Heathen . . .*" 1 Laws of the United States, 579, 580 (1815); Laws of the United States—Relating to the Public Lands, 399, 400 (1828) (emphasis added) (A. 46a).

After adoption of the Constitution, the First Congress gave "full effect" to the Northwest Ordinance, subject to "certain provisions . . . to adapt the same to the present Constitution of the United States." Act of August 7, 1789, 1 Stat. 50, 51. c. 7 (A. 48a). Although this same Congress proposed the First Amendment, it did not change any of the provisions in the Ordinance related to religion. Article III of the Ordinance, acknowledging the interrelationship of religion, morality, and knowledge to schools, remained unaltered. In 1792 Congress confirmed the grant to John Symmes previously authorized. Act of May 5, 1792, 1 Stat. 266, c. 30 § 1; Laws of the United States—Relating to the Public Lands, 373 (1828). (A. 56a). In 1794 President Washington awarded a patent to Symmes, the consent to the modification of which and the patent itself confirmed that lot No. 29 was given *for the purposes of religion.*[22] *Consent of the President to the above petition*, Laws of the United States—Relating to Public Lands, 376, 378 (1928); *J. C. Symmes's*

(1815); Laws of the United States—Relating to the Public Lands 393, 394 (1828). (A. 36a, 37a). The Act of August 29, 1788, as printed in the compilations, does not reflect inclusion. 1 Laws of the United States 584 (1815); Laws of the United States—Relating to the Public Lands 398 (1828). (A. 41a).

[22] The Act of May 5, 1792, which authorized the President to issue a letter of patent to John Cleves Symmes, simply refers back to previous authorizations without reference to the reserved lots. Laws of the United States—Relating to the Public Lands 373-374 (1828). The President's consent to a modification (A. 63a, 66a), and his confirmation of the patent on September 30, 1794 (A. 68a, 70a), did reserve lot No. 29 for "purposes of religion." 1 Laws of the United States 497, 499 (1815); Laws of the United States—Relating to the Public Lands 376, 378, 379, 381 (1828).

Patent, Laws of the United States—Relating to the Public Lands, 379, 381 (1828); 1 Laws of the United States, 497, 499 (1815).[23] As the Continental Congress had done, the Congress of the United States in 1796 confirmed the land grants to the "United Brethren for propagating the Gospel among the Heathen." Act of June 1, 1796, 1 Stat. 490, 491, c. 46 § 1 (A. 60a). Congress again affirmed these grants for propagating religion in 1802 and 1803. Laws of the United States—Relating to the Public Lands, 473, 491, No. 95 and No. 103 (1828).[24] (A. 89a & 91a). Moreover, after President Washington requested that missionaries teach the Indians "the great duties of religion and morality, and to inculcate a friendship and an attachment to the United States," [25] Congress voted funds for missionaries to teach the Indians.[26] Congress continued to make grants to religious sects for educating Indians until a change in policy in 1896.[27] See *Quick Bear v. Leupp*, 210 U.S. 50 (1907).

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[23] Only the 1828 edition contains Washington's consent on September 13, 1794, to a modification of John Cleves Symmes's patent. Laws of the United States—Relating to the Public Lands 376, 378 (1828).

[24] In discussing these grants to the United Brethren, Professor Cord summarizes: "The United States government in effect purchased, with grants of land amounting up to 12,000 acres placed in a controlling trust, the services of a religious evangelical order to settle western U.S. lands to aid the Christian Indians. This action was tantamount to underwriting the maintenance and spreading of Christianity among the Indians." R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 43 (1982); Book note in 97 Harv. L. Rev. 1509 (1984). Intervenors Ex. No. 14, on file with the Clerk's Office.

[25] President Washington's "Instructions to the Commissioners for Treating with the Southern Indians," August 29, 1789. 4 *American State Papers*, "Indian Affairs", vol. 1, serial set no 7, p. 65, 66 (Lourie and Clark ed. 1832). (A. 73a, 80a).

[26] J. O'Neill, *Religion and Education Under the Constitution* 116-119 (1949).

[27] *Id.* at 118-119.

This Court has characterized the federal government's grants to each state as "a 'solemn agreement' which in some ways may be analogized to a contract between private parties." *Andrus v. Utah*, 446 U.S. at 507. Thus, when Ohio was admitted to the Union, it carried out its responsibilities pursuant both to the Northwest Ordinance and the land grants. First, its Constitution followed language in the Northwest Ordinance, combining the religious freedom provision of Section 1 and the religion and schools provision of Section 3 of the Northwest Ordinance.

> Sec. 3. That all men have a natural and indefeasible *right to worship Almighty God according to the dictates of their conscience; that no human authority can, in any case whatever, control or interfere with the rights of conscience*; that no man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent; and that no preference shall ever be given by law to any religious society or mode of worship, and no religious test shall be required, as a qualification to any office of trust or profit. *But religion, morality, and knowledge being essentially necessary to the good government and the happiness of mankind, schools and the means of instruction shall forever be encouraged by legislative provision, not inconsistent with the rights of conscience.* Thorpe, 5 *American Charters, Constitutions and Organic Laws* (1909) p. 2901, 2910 (emphasis added)

Second, as specified by Congress in the original grant of land, Ohio preserved Section 29 lands for purposes of religion in a series of acts.[28] Reflecting Congress' dele-

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[28] For a discussion of section 16 and 29 lands in Ohio, see S. Chase, "A Preliminary Sketch of the History of Ohio," in 1 *Statutes of Ohio and the Northwest Territory* 2, 20, 28, 32 (S. Chase ed. 1833). The following Ohio statutes through 1833 refer to Section 29 lands. 1 *Statutes of Ohio and of the Northwest Territory* 361, c. 11 (1803), 526 c. 118 (1806), 555 c. 137 (1806), 637 c. 198 (1809), 665 c. 221 (1810) (S. Chase ed. 1833); 2 *Statutes of Ohio and of the Northwest Territory* 767 c. 267 (1812), 121 c. 546

tion of the designation of the funds according to the will of the majority, the state of Ohio divided the proceeds *equally among all religious societies* as indicated in an 1824 statute which provided:

> An Act to incorporate the original surveyed townships.
>
> § 1. *Be it enacted, &c.* That so soon as there are twenty electors in any original surveyed townships, of five or six miles square, or fractional township wherein there are either the *reserved section, twenty-nine or sixteen, or where said section number sixteen has been disposed of by congress,* . . .
>
> . . .
>
> § 10. *That each and every denomination of religious societies,* after giving themselves a name, shall appoint an agent, who shall produce to the trustees a certificate containing a list of their names and numbers, specifying that they are citizens of said township; and the *agent shall pay over an equal dividend of the rents,* within three months after the same shall have been received, *to be appropriated to the support of religion at the discretion of each society,* or be entitled to a portion of said rents: *Provided,* that all members above the age of fifteen years, shall be entitled to have their names enrolled by any society.
>
> . . .
>
> § 12. That in such township or fractional townships wherein *section twenty-nine* is reserved, it shall be the duty of the trustees to meet on the first Monday of January annually, at the most convenient place nearest the centre of such township or fractional township, and there *make a dividend of the*

(1822), 1450-52 c. 638 § 9, 10 (1824) (S. Chase ed. 1934); 3 *Statutes of Ohio and of the Northwest Territory* 1898-99 c. 894 § 11 (1831) (S. Chase ed. 1835); 3 *Statutes of Ohio and of the Northwest Territory* 2166-68, c. 794-814 (1799-1832); 2220-27, c. 1660-1770 (1800-1833) (S. Chase ed. 1835).

> *rents to each religious society*, agreeably to the tenth section of this act; and in making such dividend, each society shall be entitled to receive a just proportion of the money or grain received by the treasurer, in such proportion as each article in the hands of the treasurer shall make necessary.
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> 2 Statutes of Ohio and of the Northwest Territory, 1450, 52, c. 638 (1824). (Ed. by Salmon P. Chase, 1834) (emphasis added)

Alabama, has honored its "compact."[29] The state has preserved Section 16 lands for public schools.[30] Although Congress did not dedicate Section 29 lands separately for "purposes of religion," Alabama has continued to adhere to the provisions of the Northwest Ordinance that relate religion and public education, at least until precluded by decisions of this Court. Thus, the 1927 Alabama School Code began with the following explanation of Section 3 of the Northwest Ordinance relating it to the formation of Alabama and the establishment of its public education system.

> THE PARENT OF THE EDUCATIONAL LAWS OF THE SEVERAL STATES AND OF THE UNITED STATES OF AMERICA
>
> Religion, morality and knowledge being necessary to good government and the happiness of mankind,

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[29] The Enabling Act for Alabama of 1819 required substantial conformity with the Northwest Ordinance of 1787.

> . . . when formed shall be republican, and not repugnant to the principles of the ordinance of the thirteenth of July, one thousand seven hundred and eighty-seven, between the people and States of the territory northwest of the river Ohio, so far as the same has been extended to the said territory, by the articles of agreement between the United States . . .

F. Thorpe, 1 *Constitutions, Charters, and Other Organic Laws* 92, 93 (1909). (A. 95a, 97a).

[30] Ala. Code § 16-20-1 (1977); see *Opinion of the Justices* 252 Ala. 26, 39 So.2d 294 (1949).

schools and the means of education shall forever be encouraged.

(Note of Explanation)

The above is part of Article 3 of the Great Ordinance of 1787 which provided for the government of the Territory of the United States northwest of the Ohio River. This Ordinance is two years older than the Constitution of the United States. It created the first territorial government in the United States. It formed the model for all other Acts of Congress providing for territorial government, especially the Acts creating the Mississippi and Alabama Territory, which Acts were approved April 7, 1798, May 10, 1800, April 24, 1802, March 3, 1817, and April 20, 1818. *In this Great Ordinance of 1787 it was ordained that such articles should be considered as a compact between the original Thirteen States and the people thereof and the Northwestern Territory created thereby and the people thereof.* The above quoted provision was a part of Article 3 so ordained. The Acts creating the Mississippi and Alabama Territory provided that the people of such Territory "*shall be entitled to and enjoy all and singular the rights, privileges and advantages granted to the people of the Territory of the United States northwest of the River Ohio.*" The Acts of the various territorial Legislatures followed to a considerable extent the provisions embraced in the Great Ordinance of 1787; and hence it became the germ of source of the laws relating to education of the several States thereafter created. Parts of this territory northwest of the Ohio River prior to this Great Ordinance was claimed by Virginia and others of the original Thirteen States. It was ceded to the United States before the Constitution, and the territorial government created by this Great Ordinance in 1787. For these reasons, it is of next importance to the Declaration of Independence, the Constitution of the United States, and the Constitutions of the several States.

Ala. School Code (1927) (emphasis added).

The Northwest Ordinance has been virtually overlooked in this Court's modern discussion of the Religion Clauses. Other than a passing reference in *Jones v. City of Opelika*, 316 U.S. 584, 622 (Murphy, J., dissenting) (1942), associating the Northwest Ordinance with the Virginia Statute for Religious Freedom and the First Amendment, the only other reference is by Justice Douglas concurring in *Engel v. Vitale*, 370 U.S. 421 (1962), noting that the Northwest Ordinance "antedated the First Amendment." 370 U.S. at 443, N. 9. As a result there has been the uncritical assumption that Founders had not given much thought to religion and public education. See *Schempp*, 374 U.S. at 238 (Brennan, J., concurring).

The fact that the Northwest Ordinance has been overlooked appears to involve the disassociation of the Ordinance from the First Congress. While first enacted by the Continental Congress, the First Congress reenacted the Ordinance. The action of the First Congress cleared any possible doubts about the constitutional power to pass the Ordinance.[31] Nevertheless, in *Dred Scott v. Sanford*, 19 Howard 393 (1856), Chief Justice Taney disassociated the Act from the United States Congress. He viewed the Northwest Ordinance as an act of the States, not of Congress.[32] In this view, "the act of 1789 was no exercise of

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[31] At the time the Northwest Ordinance in 1787 was passed, no one challenged the power of the Continental Congress to enact it. *The Federalist*, No. 38 at 241 (Mod. Lib. ed.). James Madison, however, said the act was passed "without the least color of constitutional authority." *Id.* Madison's comment was made not to denounce the act but to argue for the enumerated powers in the Constitution. See *Id.* at 242. At approximately the same time that the Continental Congress was enacting and implementing the Northwest Ordinance, James Madison was proposing additions to the powers of Congress that would clarify Congress' authority for doing so. *See* Fehrenbacher, *The Dred Scott Case* 83 (1978). The essence of Madison's proposals was adopted in modified form in Article IV of the Constitution, *Id.* at 83-84.

[32] Fehrenbacher, *supra*, at 438-439.

power at all, but merely an acceptance of a decision previously made." [33] This provided "the way for invalidating the Missouri Compromise restriction without challenging the legitimacy of the more venerable Northwest Ordinance." [34]

As an act of the First Congress, the implications of the Northwest Ordinance for the Religion Clauses are significant. Of the six articles in the Northwest Ordinance, two related to religion. In addition to Article 3, the provision relating schools and religion, Article 1 provided for religious freedom.

> Art. 1. No person demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments, in said territory." (A. 21a, 26a).

Article 3 relating to religion and schools, and Article 1 on religious freedom, should be read *in pari materia.* These were two of the six conditions for admitting states into the Confederacy, see *The Federalist*, No. 38 at 241, and later into the Union.[35] Article I guaranteed religious freedom in the states, beginning with the admission of Ohio in 1803. Typically, the Enabling Acts for states admitted pursuant to the Northwest Ordinance, including Alabama's, provided that the state's Constitution was to conform to the Northwest Ordinance. Congress had the power to refuse to admit states if their proposed Constitutions did not so conform. *Permoli v. 1st. Municipality of New Orleans*, 3 Howard 589, 609 (1845);

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[33] *Id.* at 372.

[34] *Id.* at 373.

[35] In the Southern Territories the prohibition of slavery found in the Northwest Ordinance was deleted. The Act establishing the Mississippi Territory stipulated: "in all respects similar to that now exercised in the Territory Northwest of the river Ohio, excepting and excluding the last article* . . ." Laws of the United States—Relating to the Public Lands 434, 435 no. 76 (1828).

* An editorial note in the 1828 compilation states: "Article 6, which provides that there shall be neither slavery nor involuntary servitude otherwise than in the punishment of crimes, &c." *Id.*

Coyle v. Smith, 221 U.S. 559, 568 (1910). Although the states were free to change their constitutions after admission to the Union, *Permoli*, *supra* at 609; *Coyle*, *supra*, at 568, the fact that these states were settled on the basis of religious freedom effectively guaranteed the continuation of such practices and may well have influenced the movement toward disestablishment in the original states. One can only speculate whether, if Congress had failed to enforce the religious freedom provisions as it did the slavery provisions of the Northwest Ordinance, the nation would have experienced a domestic war over religion as it did over slavery.[36]

It would seem difficult to argue that the First Congress, which proposed the Religion Clauses of the First Amendment and which extended religious freedom to the territories, acted unconstitutionally by promoting "Religion, morality and knowledge" in public education and setting aside land "for purposes of religion." The leading advocate of strict separation, Professor Leo Pfeffer, has found these practices inconsistent with the First Amendment.[37] However, he has not had to confront the conflict between the historical facts and his theory. Relying on a secondary source, he has erroneously opined "that after the Constitution and the First Amendment were adopted no more public land was granted for the support of religion under the Ordinance."[38] Again, ap-

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[36] Among the possible causes of an internal war among states, *The Federalist Papers* listed first the possible territorial disputes, in particular potential disputes over the Western Territory if the Constitution were not adopted. *The Federalist* No. 7 at 34-35 (Hamilton) (Mod. Lib. ed.). This Court has often noted the Religion Clauses were drafted in reaction to the religious wars of Europe. See *Everson v. Board of Education*, 330 U.S. 1, 8-9 (1947).

[37] Pfeffer, *Church, State, and Freedom* 108 (1953).

[38] "Moreover, notwithstanding the committee's action in 1785, Congress granted tracts of land for the support of religion, as well as for schools, though it is important to note that after the Constitution and the First Amendment were adopted no more public land

parently relying on a secondary source, he erroneously suggested that James Madison opposed *any* grants of land for purposes of religion because Madison was opposed to the unsuccessful attempt in 1785 to dedicate lands for the "purposes of religion."[39] The 1785 proposal, which Madison opposed and which was not adopted, differed from later successful provisions. The 1785 provision would have dedicated land not simply "for purposes of religion," but would have set apart a district of land in each township "for the support of religion . . . *of the majority of male residents.*" (Emphasis added). (A. 1a, 5a). Later provisions simply set apart land "for purposes of religion," the proceeds of which were distributed equally among the various sects.[40] Most significantly,

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was granted for the support of religion under the Ordinance.[141]" *Id.* at 108. The only authority cited in support of his statements per Note 141, is a reference to R. Butts, *The American Tradition in Religion and Education* 68-71 (1950).

[39] Without citation, Pfeffer quotes Madison from a letter to Monroe, May 29, 1785:

> How a regulation so unjust in itself, so foreign to the Authority of Congress, so hurtful to the sale of the public land, and smelling so strongly of an antiquated Bigotry, could have received the countenance of a Committee is truly a matter of astonishment.

L. Pfeffer, *Church, State and Freedom* 108 (1953). Pfeffer may have relied on Butts, who quotes the same single line. *The American Tradition in Religion and Education* at 70. The entire paragraph relating to religion is as follows:

> It gives me much pleasure to observe by 2 printed reports sent me by Col. Grayson, that, in the latter, Congress had expunged a clause contained in the first, for *setting apart a district of land in each Township for supporting the Religion of the majority of inhabitants.* How a regulation so unjust in itself, so foreign to the Authority of Congress, so hurtful to the sale of the public land, and smelling so strongly of an antiquated Bigotry, could have received the countenance of a Committee, is truly matter of astonishment" 1 *Writings of James Madison* 153, 154 (1865). (emphasis added)

[40] See text of Ohio statute, *supra*, at 22.

Madison was a member of the committees that in fact set aside lands *for purposes of religion*, without reference to the will of the majority.[41] Given the actions of the First Congress as well as those of Madison, there must be an extremely strong presumption that those practices of Congress that directly promoted religion were not unconstitutional.

The issue of Congress' past practices, of course, is not directly before this Court. Moreover, some would contend that certain practices regarding religion, although once constitutionally permissible, might not be considered so today. See *Marsh v. Chambers*, —— U.S. ——, 103 S.Ct. at 3349 (Brennan, Jr., dissenting). Nevertheless, the virtually unnoticed fact that Congress laid the foundation for public school education within the context of religion and morality is relevant to the constitutionality of meditation-or-voluntary-prayer statutes. By comparison, these modern-day statutes are only the most modest form of accommodation for religion. In judging these

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[41] Madison was a member of the five-man committee which recommended on July 10, 1787 the Parson's Land contract with the reservation of Lot 29 "perpetually for the purposes of religion." 32 Journal of the Continental Congress 311, 312. Following passage of the Northwest Ordinance on July 13, 1787, other action was taken regarding the Parson's Land Contract on July 14, 1787, 32 Journal of Continental Congress 346-47. On July 23, 1787, the provisions of the Parsons Land Contract, without reference to Parsons, were passed on the recommendation by a committee, including Madison. This act set aside Section 29 "perpetually for the purposes of religion." Laws of the United States—Relating to the Public Lands 362 n. 33 (1828). (A. 33a).

Madison was also a member of the three-man committee which on September 3, 1788, recommended giving land to the society for propagating the gospel among the heathens. 34 Journal of Continental Congress 485; 1 Laws of the United States 579 (1815); Laws of the United States—Relating to the Public Lands 399 (1828). (A. 46a). The same three-man committee, including Madison, recommended at the same time that two previously past acts be amended to include the designation of land for the support of religion. 34 Journal of the Continental Congress 540, 541. (A. 43a). (See footnote 21, *supra* on the effect of the recommendation.)

statutes, it is appropriate to recall this Court's observation that ". . . Establishment Clause precedents have recognized the special relevance in this area of Mr. Justice Holmes' comment that 'a page of history is worth a volume of logic.'" *Com. for Public Education v. Nyquist*, 413 U.S. 756, 777 n. 33 (1973).

C. The Free Exercise And Establishment Clauses, Construed Together, Permit Accommodations Of Religion, Such As Meditation-Or-Voluntary-Prayer Statutes, Which Are Not Incompatible With The Private Rights Of Conscience Or The Freedom Of Religious Worship.

1. The logic of strict separation is at odds with the history of accommodation under the Religion Clauses. Not only does the Free Exercise Clause *require* certain accommodations for religious exercise, *Sherbert v. Verner*, 374 U.S. 398 (1963), but the Establishment Clause *permits* accommodations not required by the Free Exercise Clause. See e.g., *Mueller v. Allen*, —— U.S. —— 103 S.Ct. 3062 (1983) (tuition tax credits); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981) (exemption of church-operated school employees from unemployment taxes); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (implied exemption of church-operated school employees from Labor Board jurisdiction); *Gillette v. United States*, 401 U.S. 437 (1971) (exemption of religious objectors from compulsory military service); *Walz v. Tax Commission*, 397 U.S. 664 (1970) (property tax exemptions for religious organizations); *Zorach v. Clauson*, 343 U.S. 306 (1952) (off-premises public school release time programs); *Quick Bear v. Leupp*, 210 U.S. 50 (1908) (use of Indian trust monies for sectarian education).

Alabama's meditation-or-voluntary-prayer statute is a permissive, and possibly a required, accommodation of religious exercise. As a result of the Court of Appeals decision in this case on the issue of teacher-initiated

prayer,[42] the school officials will apparently be required to prohibit teachers from praying in the classroom. Previously, state and local officials had remained neutral, neither approving, prohibiting, nor even commenting on whether a teacher prayed. In all likelihood, some administrators, fearing personal liability and awards for attorneys' fees, will err in the direction of over-extending the mandate of the Court even if it erodes the Constitutional rights of free exercise of individual teachers and students.

While the plaintiffs in this case indicated no objection to student-initiated prayer even during class hours, T. 224 (Nov. 15, 1982), experience has shown such tolerance is unlikely. Hearings before the Senate Judiciary Committee on the so-called "Equal Access" bill have recorded numerous instances of over-zealous school officials suppressing the free exercise and free speech rights of students. School "districts have banned student-initiated extracurricular religious clubs, certain student community service organizations and activities (including dances to benefit the American Cancer Society), student newspaper articles on religious topics, and student art with religious themes. They have even prohibited students from praying together in a car in a school parking lot, sitting together in groups of two or more to discuss religious themes, and carrying their personal Bibles on school property. Individual students have been forbidden to say a blessing over their lunch or recite the rosary silently on a school bus." Report of the Committee on the Judiciary of the U.S. Senate on S. 1059, No. 98-357 (98th Cong., 2d Session) (1984), 11-12. It is understandable that "student witnesses told the Committee that they and their peers viewed the ban on religious speech as evidence of State hostility toward religion." *Id.* at 12.

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[42] This Court denied certiorari on the issue of teacher-initiated prayer, addressed by the Court of Appeals, J.S. 12a-16a, in a companion case, *Board of School Commissioners of Mobile Co. v. Jaffree*, No. 83-7047, cert. denied April 2, 1984.

The Committee Report concluded that the offending "administrators act not from malevolence toward religion but from ignorance of the law and erroneous legal advice." *Id.* at 6. Recognizing that there has been some degree of confusion among school administrators ever since *Engel*, the Committee found that confusion has greatly increased in the last two years since lower federal court decisions holding that school districts must prohibit even extracurricular student-initiated religious discussion.[43] *Id.* at 6-7. A shift in the legal landscape is occurring as the accretion of lower court precedents under the Establishment Clause erodes the rights of students under the Free Exercise Clause. While Congress considers whether to respond by coercing schools to accommodate the religious rights of students through a policy of "equal access," cf. *Widmar v. Vincent*, 454 U.S. 263 (1981), those state statutes which allow a period of silence for meditation or voluntary prayer may be viewed as having already provided an analogous accommodation.

2. The Free Exercise and Establishment Clauses "are to be read together, and in light of" their purpose which "is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end." *Abington School District v. Schempp*, 374 U.S. at 305 (Goldberg, J., concurring). The failure to read the clauses together has created unnecessary tension. See *Thomas v. Review Board*, 450 U.S. 707 (Rehnquist, J., dissenting) (1981). Reading the Establishment Clause in isolation from the Free Exercise Clause seems to require total separation and no aid to religion. *See Everson v. Board of Education*, 330 U.S. 1, 15 (1947). Reading the two together as a single standard, the Religion

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[43] *Brandon v. Guilderland Board of Education*, 635 F.2d 971 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981); *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F.2d 1038 (5th Cir., 1982), cert. denied 103 S.Ct. 800 (1983).

Clause "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, —— U.S. ——, 104 S.Ct. at 1359 (1984).

In *Lynch v. Donnelly*, the Court gave new life to the theory of accommodation. In fact accommodation has characterized the holdings of numerous cases simply because this Court has "refused to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective *as illuminated by history*." *Id.* at 1361 quoting *Walz*, 397 U.S. 664, 671 (with emphasis supplied by Court). Nevertheless, for lack of a conceptual framework to support its historical approach, the accommodation theory has previously proven to be largely an ad-hoc deviation from the strict separation, no aid, and strict neutrality themes.

It seems more than a coincidence that the revival of the concept of accommodation in *Lynch* is linked to the reliance for the first time in modern religion cases on Justice Joseph Story's writings.[44] Story's statements are not merely the views of one among many commentators. Appointed by Madison, whose views have been considered so important on the Religion clauses, Story relied heavily in his interpretations of the Constitution on *The Federalist Papers*, written by Madison, Hamilton and Jay. Sitting on the Supreme Court for thirty-four years, he spent twenty-four years in close collaboration with Chief Justice Marshall, who himself played a part in Virginia's struggle over religious liberty.[45] Finally, he was the first

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[44] The dissent in *Marsh v. Chambers* cites Story, with disapproval. —— U.S. ——, 103 S.Ct. at 3349 (Brennan, J., dissenting). Prior to that, there is only a passing notation of Story's work in *McGowan v. Maryland*, 366 U.S. 420, 441 (1961).

[45] As a member of the Virginia legislature, Marshall supported, against Madison and Jefferson, the "Bill for establishing a provision for the teachers of the Christian religion," Cobb, *The Rise of Religious Liberty in America*, at 495 (1902).

to write for this Court on the issues of church-state relationships. See *Terrett v. Taylor*, 9 Cranch 43 (1815) and *Vidal v. Girard's Executors*, 2 Howard 127 (1844).

Most importantly, Story's views were not simply idiosyncratic, but were grounded in the events related to the Northwest Ordinance. The Northwest Ordinance was largely the work of Nathan Dane of Massachusetts,[46] with whom Joseph Story became closely associated.[47] Story, who praised the Ordinance "for its masterly display of the fundamentals of civil and religious liberty," 3 Story, *Commentaries* § 1318, 191, said that "[t]he third [section] provides *for the encouragement of religion*, and education, and schools . . ." *Id.* at § 1318, 192. (emphasis added). The fact that Story's discussion of religious liberty coincided with the principles of the Northwest Ordinance and that the Ordinance represented a "consensus upon basic republican goals and principles,"[48] are sufficient reasons to give great weight to the discussion by Story.

In *Terrett v. Taylor*, 9 Cranch 42 (1815), Justice Story, writing for a unanimous Court, specifically addressed the Virginia experience. Story ruled that the legislature of the state of Virginia lacked the authority to expropriate land formerly granted to the Church of England. Jefferson had carried the logic of strict separation to the point of influencing the Virginia legislature to pass a statute in 1801 which, asserting its right to all the property of the Episcopal Churches in the state, had directed that

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[46] Fehrenbacher, *supra*, N. at 79; 3 Story, *supra* N. a5 17, N. 1.

[47] Dane endowed a chair for Story at the Harvard Law School and prescribed that Story write a series of publications, which included his *Commentaries on the Constitution*. See Sutherland, *The Law at Harvard*, 93-107 (1967).

[48] Berkhofer, *supra*, n. 20 at 261.

Church property be sold and the proceeds given to the poor.[49] Speaking for the Court, Justice Story said:

> . . . although it may be true that "religion can be directed only by reason and conviction, not by force or violence," and that "all men are equally entitled to the free exercise of religion according to the dictates of conscience," as the bill of rights of Virginia declares, yet *it is difficult to perceive how it follows as a consequence that the legislature may not enact laws more effectively to enable all sects to accomplish the great objects of religion* by giving them corporate rights for the management of their property, and the regulation of their temporal as well as spiritual concerns. Consistent with the constitution of Virginia the legislature could not create or continue a religious establishment which should have exclusive rights and prerogatives, or compel the citizens to worship under a stipulated form or discipline, or to pay taxes to those whose creed they could not conscientiously believe. But *the free exercise of religion cannot be justly deemed to be restrained by aiding with equal attention the votaries of every sect to perform their own religious duties*, or by establishing funds for the support of ministers, for public charities, for the endowment of churches, or for the sepulture of the dead. *Id.* 48-49. (Emphasis added.)

This *Court's original understanding* of the First Amendment's Religion Clauses was that of no preference among sects. This allowed "the Catholic and the Protestant, the Calvinist and the Armenian, the Jew and the Infidel [to] sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship." 3 Story, § 1879, at 667. (A. 110a).

Any hesitancy to give deference to Story's views may be due to his unequivocal statements about this country

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[49] J. McClellan, "Christianity and the Common Law" in *Joseph Story and the American Constitution*, 129 (1971).

being a Christian nation. The unedited version of a quote which appears in *Lynch*, 104 S.Ct. at 1361, is as follows:

> The real object of the amendment was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to a hierarchy the exclusive patronage of the national government. 3 Story, § 1877, 664 (A. 107a).

Taken by itself, this much might appear to us today to constitute intolerance. The Religion Clauses, however, were understood as permitting both the promotion of religion and the protection of conscience.

> But the duty of supporting religion, and especially the Christian religion, is very different from the right to force the conscience of other men, or to punish them for worshipping God in the manner which they believe their accountability to him requires. *Id.* § 1876, 664 (A. 106a).

3. As is apparent from *Lynch* and *Marsh*, there is beginning to be a realization that the strict separation and related theories do not accurately reflect the meaning of the Religion Clauses. The Court's previous approach of "limit[ing] its historical inquiry to the particular practice under review," *Lynch v. Donnelly*, 104 S.Ct. at 1383 (Brennan, J., dissenting), has given rise to a theory of the Religion Clauses at odds with the history. As the history is recovered and becomes part of the case law, see, e.g. *Lynch v. Donnelly*, 104 S.Ct. 1355, *Marsh v. Chambers*, 103 S.Ct. 3330, some will impugn the argument from history—formerly the justification for strict separation, see *Everson*, *supra*—and will prefer the theory created by a distorted history on the basis that "practices which may have been objectionable to no one in the time

of Jefferson and Madison may today be highly offensive to many persons . . ." *Marsh*, 103 S.Ct. at 3348 (Brennan, J., dissenting and quoting Brennan, J., concurring in *Schempp*, 374 U.S. at 240-241).

A theory of accommodation is also supportable by a *structural*, as distinct from an historical, view of the Religion Clauses.[50] The understandings of Story who spoke of "encourag[ing] the Christian religion generally," of Madison who sought to promote a "multiplicity of sects," and of Jefferson who insisted that matters of religion were left to the states, all formerly came to the same result of leaving such matters to the states. See *Barron v. Baltimore*, 7 Peters 243 (1833); *Permoli v. New Orleans*, 3 Howard 589 (1845). Assuming arguendo the propriety of incorporating the Establishment Clause as applicable to the states,[51] we submit that a theory of accommodation most accurately addresses the "broad purposes" of all the Framers.

Even if it were possible to adhere to Jefferson's strict theory of separation, which he himself did not,[52] this Court's cases have reversed Jefferson's structural view of strict separation. Jefferson advocated strict separation at the national level and, therefore, refused on constitutional grounds to issue Thanksgiving Day proclamations,[53] a practice which this Court has assumed in dicta to be constitutional. *Lynch v. Donnelly*, 104 S.Ct. at 1360. Although as a Virginian Jefferson worked successfully for separation, he held, as reflected in his second in-

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[50] See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); Black, *Structure and Relationship in Constitutional Law* (1969).

[51] Apellants understand the Court's grant of review to exclude the issue of the Fourteenth Amendment's incorporation of the Establishment Clause which was discussed in the lower court opinions.

[52] See *Cord, Separation of Church and State: Historical Fact and Current Fiction*, 36-47 (1982).

[53] *Id.* at 39-40.

agural address, that religion was a matter to be left strictly to the states.[54] Given this Court's incorporation of the Establishment Clause, *Everson v. Board of Education*, *supra*, there is little relationship between this Court's understanding of the Religion Clauses and Thomas Jefferson's constitutional philosophy.

As long as the Establishment Clause was not applicable to the states, its meaning presented few practical problems. When *Engel* and *Schempp* generated public opposition, it was assumed by some that the controversies were due not to any novel understanding of the Religion Clauses, but to the novelty of applying well-established principles to the states. Most Establishment Clause cases have seemed to involve essentially state issues, such as aid to religious schools or religious influence in public schools. In *Marsh v. Chambers*, *supra*, and *Lynch v. Donnelly*, *supra*, this Court addressed issues (legislative chaplains and nativity displays) which, while raised in state cases, had implications for practices of Congress and the President. As this Court has begun to consider more fully the Religion Clauses as applied to the national government, it has become clearer that it is not "possible or desirable to enforce a regime of total separation . . . ." *Lynch*, 104 S.Ct. at 1359, quoting *Nyquist*, 413 U.S. 756, 760 (1973). While the issue in this case differs from those in *Lynch* and *Marsh*, with their national implications, it cannot reasonably be contended that the Establishment Clause imposes a more rigid standard on issues of concern primarily to the states, than on those of concern also to the national government.

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[54] "In matters of religion I have considered that its free exercise is placed by the Constitution independent of the powers of the General Government. I have therefore undertaken on no occasion to prescribe the religious exercises suited to it, but have left them, as the Constitution found them, under the direction and discipline of the church or state authorities acknowledged by the several religious societies." T. Jefferson, "Second Inaugural," Mar. 4, 1805, reprinted in *The Presidents Speak*, 19, 20 (1961).

Removing the "incorporation debate" as an issue from this case has revealed several instructive ironies. It was the Congress which promoted religion in public schools with the passage of the Northwest Ordinance. It was Congress' passage of the Northwest Ordinance which was relied on, before the Fourteenth Amendment, to argue that certain basic civil liberties bound the states. See *Permoli v. New Orleans*, 3 Howard 589 (1845); *Dred Scott v. Sanford*, 19 Howard 393 (1856). It was Congress which, through the abortive Blaine Amendment,[55] would have permitted Bible reading in public schools even while prohibiting a state establishment of religion.[56]

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[55] Title 4 Cong. Rec. 5580 (1876) states in pertinent part, that: "No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification for any office of public trust under any State. No public property, and no public revenue of, nor any loan of credit by or under the authority of the United States, or any State . . . shall be appropriated to, or made or used for, the support of any school, educational or other institution, under the control of any religious or anti-religious sect . . . wherein the particular creed or tenets of any religious or anti-religious sect . . . shall be taught; and no such particular creed or tenets shall be read or taught in any school or institution supporting whole or in part by such revenue or loan of credit; and no such appropriation or loan of credit shall be made to any religious or anti-religious sect . . . to promote its interest or tenets. *This article shall not be construed to prohibit the reading of the Bible in any school or institution. . . .*" As cited in *Jaffree v. Wallace*, 705 F.2d at 1531, & n. 5. J.S. 9A (emphasis added).

[56] Most of the discussion over the *Blaine Amendment* concerns whether it evidences an understanding by the Congress of the time that the Fourteenth Amendment did not incorporate the Establishment Clause. See *Schempp*, 374 U.S. at 257. No one questions that had the Blaine Amendment passed it would have clearly applied the Establishment Clause to the states. The language, however, indicates an understanding that a prohibition of an establishment of religion is not inconsistent with Bible reading in public schools.

We respectfully submit that the nationalist perspectives of Story and the early Madison, which are bound up with the Northwest Ordinance and rooted in *The Federalist Papers*, should guide this Court in developing a theory of accommodation under the Religion Clauses. *The Federalist Papers*, written in part by Madison and frequently quoted by Story, deem the promotion of a *large* commercial republic and a multiplicity of religious sects essential elements for establishing domestic tranquility.[57] The unique contribution of *The Federalist Papers* in the history of political thought is the theory of pluralism.[58] The fact that established state churches ceased to exist prior to the Fourteenth Amendment, and the intervention of federal courts, pays tribute not only to the good sense of the American people, but to the direction and influence of *The Federalist Papers.*

In all the discussions of Madison's understanding of the Religion Clauses, relatively little attention has been paid to his writing in *The Federalist Papers. Larson v. Valente*, 456 U.S. 228, 245 (1982), mentioned Madison's discussion in *Federalist* No. 51 of a "multiplicity of interests" as a protection for religious rights, but without reference to Madison's discussion in *Federalist* No. 10, which concerns the danger of factions. Madison defined a "faction" as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." *Federalist* No. 10 at 54 (Mod. Lib. ed.) He clearly included religious groups in this definition. Nevertheless, his approach when dealing with the Constitution differed

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[57] Shklar, "Publius and the Science of the Past," 86 Yale Law Journal, 1273, 1291 (1977).

[58] Mace, *Locke, Hobbes, and the Federalist Papers*, xii (1978); See also Diamond, "The Federalist," in Strauss et al., *History of Political Philosophy* (1963).

in part from his support of the Declaration of Rights for his own state of Virginia. His solution to the dangers posed by religious and other factions as a national, and therefore a constitutional problem, was to eliminate the "*effects*", rather than the "*causes.*" Pluralism would be achieved by multiplying factions dispersed throughout a large commercial republic, as opposed to the anti-Federalist (Jeffersonian) advocacy of small "virtuous religiously dominated republics".[59] Madison summarized the solution to factionalism as something which is more subtle than today's popular notion of "pluralism":

> The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A *religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. . . .*
>
> In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government. And according to the degree of pleasure and pride we feel in being republicans, ought to be our zeal in cherishing the spirit and supporting the character of Federalists. *Federalist* No. 10 at 61-62 (Mod. Lib. ed.) (emphasis added)

It would not have been at all inconsistent for Madison to support Congress' promotion of religion without dis-

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[59] The anti-Federalists favored small republics, and "urged that the new rulers should turn their attention to the *task, which surpasses the framing of constitutions, of fostering religion and morals, thereby making government less necessary* by rendering 'the people more capable of being *a Law to themselves.*' Such self-government was possible, however, only if the center of gravity of American government remained in the states." Storing, *What the Anti-Federalists Were For* (1981) at 23 (footnote omitted; emphasis added in part).

crimination among sects as a means of diluting the influence of the majority religious sect in each locale. The "secular purpose" would have been both the protection of religious minorities and political stability. The rationale clearly stated for confining religious matters to the states has nothing to do with states' rights, but rather with protecting the national government from religious pressures.

The dangers of religious factionalism described by Madison and basically solved through the workings of our constitutional republic are once again very much present. Today, the flame of religious zeal is everywhere in evidence in matters that are also political. But this activity is not, as intended by Madison's understanding of the Constitution, confined to particular parts of the republic. The availability of electronic technology has undoubtedly facilitated the formation of national factions, religious and others. It must be candidly admitted, however, that mobilization of religious pressures on national legislation is surely a result of the nationalization of religious issues. A growing solidarity among various denominations, some opposed to restoring school prayer even by a constitutional amendment, is seeking some accommodation for the free exercise rights of students. Whether they will succeed is less significant than the fact that they are trying. What concerned Madison was not whether a faction constituted a majority or minority, but whether it was able to become a national movement. See *Federalist* No. 10.

The way to guarantee that the Constitution will last for the ages is not by wandering from the wisdom of the Founders, especially on issues of religion. We respectfully suggest that this case gives the Court an opportunity to defuse some of the untoward effects of religious factionalism which have followed from *Engel* and *Schempp*. We suggest, therefore, that the Court (1) uphold the Alabama meditation-or-voluntary-prayer statute without reliance on the three-part test; (2) limit the overly-broad reading of *Engel* and *Schempp* implicit in the Circuit Court's

voiding of the meditation-or-voluntary-prayer statute; and (3) prescribe accommodation for the rights of religious liberty and of conscience as the touchstone for interpreting the Religious Clauses.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Eleventh Circuit should be reversed.

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Nos. 83-812 and 83-929

In the Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS

v.

ISHMAEL JAFFREE, ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS

v.

ISHMAEL JAFFREE, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

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QUESTION PRESENTED

Whether a state statute that authorizes public school teachers to commence the school day by having their classes observe a moment of silence, during which students may engage in silent meditation or voluntary prayer, violates the Establishment Clause of the First Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-812

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS

v.

ISHMAEL JAFFREE, ET AL.

No. 83-929

DOUGLAS T. SMITH, ET AL., APPELLANTS

v.

ISHMAEL JAFFREE, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

INTEREST OF THE UNITED STATES

The State of Alabama, like some 23 other states, has authorized a moment of silence in the public schools to enable students to engage in silent meditation and voluntary prayer. The court below held this practice unconstitutional under the First Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment. The United States has a substantial interest in this matter, which raises the question whether the Constitution prohibits neutral and noncoercive means

of accommodating private religious practices in the public schools and, by extension, in other public contexts. Among federal government activities potentially implicated by a prohibition on governmental accommodation of religion are the grant of tax preferences for religious institutions, the allowance of religious holidays to federal employees, and the enforcement of the religious accommodation requirements of Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.*

In addition, the United States is authorized to operate schools for military and foreign service dependents under certain circumstances (10 U.S.C. 7204 (Navy); 20 U.S.C. 241 (federal property); 20 U.S.C. 926 (Defense Department); 22 U.S.C. 2701 (foreign service)) and schools for Indians (25 U.S.C. 271-304b). The resolution of this case will bear on Congress's authority to allow periods for silent prayer or meditation in such schools.

The United States has participated as a party or as amicus curiae in numerous cases arising under the Religion Clauses of the First Amendment. See, *e.g.*, briefs filed by the United States as amicus curiae in *Estate of Thornton* v. *Caldor, Inc.*, cert. granted, No. 83-1158 (Mar. 5, 1984); *School District of Grand Rapids* v. *Ball*, cert. granted, No. 83-990 (Feb. 27, 1984); *Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984); *Marsh* v. *Chambers*, No. 82-23 (July 5, 1983); *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977); *Sloan* v. *Lemon*, 413 U.S. 825 (1973); *Roemer* v. *Board of Public Works*, 426 U.S. 736 (1976); and *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), and briefs filed as a party in *United States* v. *Lee*, 455 U.S. 252 (1982), and *Tilton* v. *Richardson*, 403 U.S. 672 (1971).

STATEMENT

1. Appellee Ishmael Jaffree, an agnostic, filed this suit in the United States District Court for the Southern District of Alabama on behalf of three of his children who

attend Mobile County, Alabama public schools. In his original complaint, he challenged the practices of certain teachers who, at their own initiative, conducted prayers with students during school hours. Subsequently, appellee amended his complaint to join as defendants the Governor of Alabama, the state Attorney General, and several state education officials, and to challenge the constitutionality of two state statutes: Ala. Code § 16-1-20.1 (Supp. 1982), which authorizes teachers to institute a brief period of silence ("not to exceed one minute") for meditation or voluntary prayer at the commencement of the first class period,[1] and a separate, independent state statute, passed after initiation of the lawsuit, that would have permitted recitation of a state-composed prayer at the beginning of any homeroom or class period.[2] A group of parents in-

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[1] Ala. Code § 16-1-20.1 (Supp. 1982) provides that:

> At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.

This provision became effective on April 29, 1981. A separate provision, Ala. Code § 16-1-20, not involved in this case, also provides for a moment of silence in Alabama public schools. That statute differs from the provision at issue here in three respects: it applies only to grades one through six, it requires (rather than permits) teachers to conduct the moment of silence, and it refers to "meditation" alone. The judgment of the court of appeals did not directly pertain to Ala. Code § 16-1-20, and the latter is not at issue here.

[2] The statute, Ala. Code § 16-1-20.2, provided that:

> From henceforth, any teacher or professor in any public educational institution within the state of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may pray, may lead willing students in prayer, or may lead the willing students in the following prayer to God:
>
> Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May

tervened to support both spoken prayer and the moment of silence. Spoken prayer, rather than the moment of silence, was the main focus of litigation in the lower courts.

The district court issued a preliminary injunction barring implementation of both statutes (J.S. App. 64d-75d). For trial on the merits, the court severed appellee's claim challenging teacher-initiated prayer from his claim challenging the state statutes. Thereafter the court concluded that "the establishment clause of the first amendment to the United States Constitution does not bar the states from establishing a religion" (J.S. App. 59d). It therefore dismissed the challenge both to teacher-initiated prayer (*Jaffree* v. *Board of School Commissioners of Mobile County*, 554 F. Supp. 1104 (J.S. App. 1d-55d)) and to the Alabama statutes (*Jaffree* v. *James*, 544 F. Supp. 727 (J.S. App. 56d-61d)) for failure to state a claim upon which relief can be granted (J.S. App. 53d, 59d).[3]

2. Appellee Jaffree appealed to the Eleventh Circuit, and Justice Powell, as Circuit Justice, issued an order granting a stay of the district court's order and reinstating the injunction pending final disposition of the appeal (J.S. App. 2e-5e).

The court of appeals reversed the dismissal of each of appellee's claims and remanded the case for entry of an order enjoining implementation of the statutes and teacher-initiated prayers. *Jaffree* v. *Wallace*, 705 F.2d 1526 (J.S. App. 1a-20a). The court concluded (J.S. App. 7a-12a) that the district court's interpretation of the

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Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools in the name of our Lord. Amen.

This provision was enacted on July 8, 1982, some 14 months after the moment of silence statute became effective.

[3] The district court accordingly dissolved the preliminary injunction (J.S. App. 59d).

First Amendment is contrary to cases decided by this Court, including *Everson* v. *Board of Education*, 330 U.S. 1 (1947); *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948); *Abington School District* v. *Schempp*, 374 U.S. 203 (1963); and *Engel* v. *Vitale*, 370 U.S. 421, 429-430 (1962). In one paragraph of its 20-page opinion (J.S. App. 18a), the court of appeals held the moment of silence statute unconstitutional because its objective was "the advancement of religion." The court stated: "We do not imply that simple meditation or silence is barred from the public schools; we hold that the state cannot participate in the advancement of religious activities through any guise, including teacher-led meditation. It is not the activity itself that concerns us; it is the purpose of the activity." J.S. App. 18a.[4]

The court of appeals denied a petition for rehearing and rehearing en banc (J.S. App. 1b-2b). Four judges dissented from the denial of rehearing en banc insofar as the decision invalidated Alabama's moment of silence statute (*id.* at 2b-4b). The dissenting judges observed first that the significance of the decision "transcends one state and one statute," because many states have enacted similar laws (*id.* at 2b-3b). Second, the dissenting judges noted that the constitutionality of observing moments of silence in the public schools had not been resolved by this Court, and that other courts had reached conflicting decisions (*id.* at 3b). Finally, the dissenting judges expressed "some doubt as to the correctness of the panel opinion" (*ibid.*), citing extensive schol-

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[4] Because the district court viewed the Establishment Clause as not applicable to the states (J.S. App. 59d), it did not make factual findings with respect to the purposes or consequences of the statutes in question, nor did it separately analyze the statutes. The court of appeals rejected the district court's interpretation of the reach of the Establishment Clause (J.S. App. 10a-11a), but did not remand for a separate inquiry on the administration of the moment of silence statute. Instead, it held the moment of silence statute invalid on its face. *Id.* at 18a.

arly and judicial authority in support of the constitutionality of moment of silence provisions (*id.* at 3b-4b). The judges concluded that, however the issue might be resolved by the en banc court, "it is important and sufficiently unsettled to command its attention" (*id.* at 4b).

3. The State and the intervenors appealed to this Court with respect to both state statutes, and the School Board filed a petition for a writ of certiorari with respect to the statutes and the teacher-initiated prayers. This Court summarily affirmed the judgment of the court of appeals invalidating the state-composed prayer statute, denied the petition for certiorari, and noted probable jurisdiction to review the decision striking down the moment of silence statute.

SUMMARY OF ARGUMENT

In 1962, this Court held that a state may not direct or permit public school teachers to lead their students in recitations of a prayer. *Engel* v. *Vitale*, 370 U.S. 421. Since that time, Alabama and some 23 other states have enacted statutes authorizing or requiring daily moments of silence in the public schools.[5] At least until recently, these provisions have generally been thought to be constitutional. *Abington School District* v. *Schempp*, 374 U.S.

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[5] In addition to Ala. Code § 16-1-20.1 (Supp. 1982), see Ariz. Rev. Stat. Ann. § 15-522 (Supp. 1983); Ark. Stat. Ann. § 80-1607.1 (1980); Conn. Gen. Stat. Ann. § 10-16a (West 1981); 61 Del. Laws ch. 547 (1978) (as interpreted in Op. Att'y Gen. 79-I 011 (1979)); Fla. Stat. Ann. § 233.062 (West Supp. 1983); Ga. Code Ann. § 20-2-1050 (1982); Ill. Rev. Stat. ch. 122, ¶ 771 (Supp. 1983); Ind. Code Ann. § 20-10.1-7-11 (Burns Supp. 1983); Kan. Stat. Ann. § 72.5308a (1980); La. Rev. Stat. Ann. § 17:2115 (West 1982); Me. Rev. Stat. Ann. tit. 20-A, § 4805 (1982); Md. Educ. Code Ann. § 7-104 (1978); Mass. Ann. Laws ch. 71, § 1A (Michie/Law. Co-op. Supp. 1983); Mich. Comp. Laws § 380.1565 (1979); N.J. Rev. Stat. § 18A:36-4 (Supp. 1983); N.M. Stat. Ann. § 22-5-4.1 (1981); N.Y. Educ. Law § 3029-a (McKinney 1981); N.D. Cent. Code § 15-47-30.1 (1981); Ohio Rev. Code Ann. § 3313.601 (Page 1980); Pa. Stat. Ann. tit. 24, § 15.1516.1 (Purdon Supp. 1983); R.I. Gen. Laws § 16-12-3.1 (1981); Tenn. Code Ann. § 49-1922 (Supp. 1982); Va. Code § 22.1-203 (1980).

203, 281 (1963) (Brennan, J., concurring) (footnote omitted) ("the observance of a moment of reverent silence at the opening of class" might be considered a "nonreligious means" of serving "solely secular purposes * * * without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government"); *Gaines* v. *Anderson*, 421 F. Supp. 337 (D. Mass. 1976) (three judge court); *Opinion of the Justices*, 113 N.H. 297, 301, 307 A.2d 558, 560 (1973).[6] In the last two years, however, three district courts, in addition to the court of appeals below, have held that such provisions violate the Establishment Clause. *May* v. *Cooperman*, 572 F. Supp. 1561 (D. N.J. 1983); *Duffy* v. *Las Cruces Public Schools*, 557 F. Supp. 1013 (D. N.M. 1983); *Beck* v. *McElrath*, 548 F. Supp. 1161 (M.D. Tenn. 1982).

We believe that provision for a moment of silence in the public schools is not an establishment of religion, but rather a legitimate way for the government to provide an opportunity for both religious and nonreligious introspection in a setting where, experience has shown, many desire it. It is an instrument of toleration and pluralism, not of coercion or indoctrination.

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[6] The weight of scholarly authority also favors the moment of silence. See, *e.g.*, L. Tribe, *American Constitutional Law* § 14-6, at 829 (1978); P. Freund, *The Legal Issue, in Religion in the Public Schools* 23 (1965); Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 Minn. L. Rev. 329, 371 (1963); Kauper, *Prayer, Public Schools and the Supreme Court*, 61 Mich. L. Rev. 1031, 1041 (1963); Comment, *Accommodating Religion in the Public Schools*, 59 Neb. L. Rev. 425, 450-454 (1980); Note, *Religion and the Public Schools*, 20 Vand. L. Rev. 1078, 1092-1093 (1967). But see, *e.g.*, Drakeman, *Prayer in the Schools: Is New Jersey's Moment of Silence Law Constitutional?*, 35 Rutgers L. Rev. 341 (1983); Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools*, 96 Harv. L. Rev. 1874 (1983) [hereinafter cited as Harvard Note]; Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis*, 58 N.Y.U.L. Rev. 364 (1983) [hereinafter cited as NYU Note].

A. The moment of silence is constitutional for the same reasons the released time program in *Zorach* v. *Clauson*, 343 U.S. 306 (1952), was constitutional. Whether the moment of silence is used for prayer or for other contemplative activity is purely a matter of voluntary choice. The moment of silence is perfectly neutral with respect to religious practice: it neither favors one religion over another nor conveys endorsement of religion. It occasions no interference by the government in the affairs of religious institutions. Indeed, from the perspective of the Establishment Clause, the moment of silence is less problematic than the *Zorach* released time program.

B. The cursory analysis employed by the court below is deficient in that it does not distinguish between government efforts to sponsor (or "establish") a religion and government efforts to accommodate the voluntary practice of religion. The court's wooden application of the three-part test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), reflects this deficiency: under it *all* government actions that have the purpose or effect of facilitating or accommodating religious observance would be invalid. Numerous holdings of this Court make it clear that the Religion Clauses do not invalidate governmental acts whose purpose and effect is to facilitate opportunities for voluntary religious practice.

C. Certain other objections have been raised to moment of silence provisions. They have been thought unnecessary (since students are free to engage in silent prayer during other school activities); they have been thought susceptible to unconstitutional administration; they have been thought coercive in requiring students who do not wish to pray to remain silent. These are not, in our view, objections of a constitutional dimension; they certainly do not justify facial invalidation of the statutes of Alabama and some 23 other states.

D. Perhaps most fundamentally, the moment of silence has been opposed because it is inconsistent with a view of the Establishment Clause which would require the absolute elimination of religious elements from our public

schools and public life. That view, however, has been consistently rejected by this Court. The purpose of the Establishment Clause is not to work an artificial secularization upon our public life and institutions, but to ensure that the force of government is not brought to bear to induce or to restrain voluntary religious exercise (or nonexercise). The moment of silence, we submit, is fully consistent with that purpose.

ARGUMENT

A MOMENT OF SILENCE FOR MEDITATION OR PRAYER IN THE PUBLIC SCHOOLS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

In 1962, this Court held that the First Amendment, as applied to the states through the Fourteenth Amendment, prohibits the states from directing or permitting public school teachers to lead their classes in the recitation of a prayer. *Engel* v. *Vitale*, 370 U.S. 421. If anything has become clear during the more than 20 years of public controversy that has ensued, it is that opinions on the question of the proper role of religious observance in the public schools vary dramatically and are passionately held. Many persons feel, with intense sincerity, that the everyday world of work or study ought to include at least a moment during which individuals have an opportunity to acknowledge a transcendent element in their lives. This need is felt most acutely by persons of religious faith who believe that prayer should be an integral part of all of life's activities, including school, and that the state in its role as enforcer of compulsory education laws and provider of universal public education should be ready to accommodate this belief. The practice of opening the school day with spoken prayer and scriptural reading was responsive to these feelings; when this practice was declared unconstitutional, it was perceived by many as a rebuff to fundamental aspirations.

On the other hand, in ruling these practices invalid the Court was responding to other concerns that are also deep and intense. Many persons feel that the recitation of prayers and scriptures in school is an invasion of their right to control their, or their children's, religious life. They believe that there is no way to ensure the truly voluntary character of prayer in this context—that impressionable young people will feel pressure to engage in religious observances in which they do not believe. There is also the concern that decisions about what prayer to recite, what scripture to read, will create the appearance of an official endorsement of one faith, to the disadvantage of adherents of minority faiths or of no religion at all.

Evidently one way to meet these latter concerns is to eliminate all opportunity for devotional practices at school. Students can pray, if they want to pray, at home, or if they can find a suitable occasion during snatches of inactivity in the school day. We do not doubt that this approach is constitutional; it is unlikely that in most contexts a strong Free Exercise claim could be made that time for personal prayer must be set aside during the school day.

The question before the Court, however, is whether this approach—which flatly rejects the intensely felt desire of some to be allowed an opportunity for a brief formal moment of devotion within the school day—is the *only* constitutional approach. The legislatures of twenty-four states have concluded that the practice at issue here, a moment of silence for the purpose of silent meditation, provides an alternative that meets the concerns about genuine voluntariness and evenhandedness which animated the school prayer decisions, but that also accommodates the desire of so-minded students to pray. Our submission is that this is a valid solution—one that advances the purposes of the Religion Clauses.

The Alabama statute provides a brief period of quiet in which students can direct their attention away from the

immediate press of classroom activity without interruption, distraction, or fear of embarrassment. It creates a moment of privacy, an opportunity for either religious or nonreligious introspection (in the language of the statute, either "prayer" or "meditation") in a setting where, as experience has shown, many desire it. It is a means for accommodating the religious and meditative needs of students without in any way diminishing the school's own neutrality or secular atmosphere. Indeed, for persons who believe that prayer must be an integral part of all of life's activities (including school), it may make the difference between being able, in good conscience, to attend a secular public school and being forced to seek an explicitly religious alternative education.

Silence operates in a perfectly tolerant, neutral, and libertarian manner. What is done within it remains a mystery. Each boy or girl may meditate or pray; but no one can know who prays or how he does it; and each is equally free to think about yesterday's football game or tonight's date and no one will be the wiser. Silence thus accommodates those who wish to engage in the "free exercise" of prayer even during school hours, but does so without coercing or disturbing any other person. The moment of silence is an instrument of toleration and pluralism, not of coercion or indoctrination.

A moment of silence is, after all, just that: a brief period of quiet, during which students are asked to do but one thing—to be still, alone with their thoughts. By requiring a moment of silence, then, the teacher does nothing more coercive than to reaffirm this simple truth: silent reflection—no less than listening, reading, and talking—is important to education and learning. Introspection, whether religious or nonreligious, is part of the life of the mind. That is why Wordsworth called silence a "daily teacher" and Keats thought truth a "foster-child of silence."

A. Like the Released Time Program in *Zorach* v. *Clauson*, Alabama's Moment of Silence Statute is a Permissible Government Accommodation of Religious Exercise; the Opportunity It Provides for Religious Exercise is Purely Voluntary, is Neutral Among Religions and Between Religion and Nonreligion, and Occasions No Interference by the State In Church Affairs

The fundamental impulse that led to the adoption of the Religious Clauses of the First Amendment was the desire to give free scope to religious practice without the interference that governmental prohibitions or establishments would necessarily entail. The end is toleration and accommodation, not the removal of all traces of religion from our public life. See generally *Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984), slip op. 4-9. That is why this Court has repeatedly recognized that governments may expand opportunities for voluntary religious exercise, and may—indeed, sometimes must—ease burdens caused by facially neutral public or private practices that make it difficult for individuals to observe their faith.[7] See *McDaniel* v. *Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring); Br. for the United States as Amicus Curiae in *Estate of Thornton* v. *Caldor, Inc.*, *supra*, at

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[7] The Framers of the Bill of Rights were well aware of the concept of nonmandatory religious accommodation by the government. For example, during debate on adoption of the Second Amendment, the First Congress considered language that would have provided that "no person religiously scrupulous of bearing arms shall be compelled to render military service in person." 1 Annals of Cong. 434 (J. Gales ed. 1789). The language was deleted, in large part because, as Egbert Benson of New York put it, "[n]o man can claim this indulgence of right. It * * * ought to be left to the discretion of the Government." *Id.* at 750. This incident strongly supports the view that the Congress and the legislatures of the various states have discretion to undertake action to facilitate religious scruple. See also C. Antieau, A. Downey & E. Roberts, *Freedom From Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* 62-91 (1964) (describing numerous early examples of governmental cooperation with religion).

15-17.[8] The moment of silence is an example of a permissible accommodation of religion. Through it the State —without itself sponsoring or endorsing religion—provides an opportunity for purely voluntary private devotion in the context of a highly structured, compulsory state institution where such opportunities would otherwise be nonexistent or extremely limited.[9]

The constitutionality of the moment of silence is most powerfully supported by this Court's holding in *Zorach* v. *Clauson*, 343 U.S. 306 (1952).[10] There, the school authorities faced the question of how best to deal with the "religious needs" (*id.* at 315) of some students for religious instruction or devotion. A prior decision, *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948), had held that public schools could not invite religious instructors into the school for purposes of religious instruction. Nonetheless, apprehending the need to "respect[] the religious nature of our people and accommodate[] the public service to their spiritual needs" (343 U.S. at 314), the school district in *Zorach* decided to permit students, with the permission of their parents,

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[8] A copy of that brief has been provided to the parties in this case.

[9] It is particularly appropriate for the state to provide an opportunity for voluntary religious exercise in circumstances such as military service, prisons, or compulsory schooling, where the state has itself created a regimented environment that would—in the absence of governmental accommodations—tend to inhibit religious exercise. See *Marsh* v. *Chambers*, No. 82-23 (July 2, 1983) slip op. 17-18 (Brennan, J., dissenting).

[10] The continued authority and vitality of *Zorach* is not in doubt. Although decided by a closely divided Court (three Justices dissenting), *Zorach* has become one of the leading cases on the principle that the Religion Clauses permit certain accommodations for religious practice. It has been cited approvingly by both majority and dissenters in recent Establishment Clause cases. See, *e.g.*, *Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984), slip op. 4, 5, 8, 12 (majority opinion); slip op. 21-22 (Brennan, J., dissenting); *Marsh* v. *Chambers*, No. 82-83 (July 5, 1983), slip op. 9 (majority opinion); slip op. 1 n.1, 17-18 n.29 (Brennan, J., dissenting).

to leave the school grounds and go to religious centers for religious instruction.

This Court held that the released time program in *Zorach* was constitutional. It observed that "[w]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions" (343 U.S. at 313-314). The Court reasoned (*id.* at 313) that there are many circumstances in which public school students need special provision to enable them to exercise their religion. Examples given were Roman Catholic mass during school hours on a Holy Day of Obligation, Jewish observances on Yom Kippur, and Protestant attendance at a family baptismal ceremeny. The need for regular religious instruction and devotion, the Court found, is not different. Whether religious accommodation is made "occasionally for a few students, regularly for one, or pursuant to a systematized program designed to further the religious needs of all the students does not alter the character of the act." *Ibid.*

The moment of silence is an equally appropriate response to the religious needs of many students.[11] By providing a brief opportunity for contemplative activity at the beginning of the school day, the government does not itself engage in or sponsor a religious activity; silence is spiritually and ideologically neutral. All the government

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[11] It might be argued that the moment of silence is more like the on-premises released time program invalidated in *McCollum* than the off-premises program approved in *Zorach*, simply because the opportunity for religious practice here takes places physically on the public school premises. However, the constitutional flaw in the *McCollum* program was that "the classrooms were used for religious instruction and the force of the public school was used to promote that instruction." *Zorach*, 343 U.S. at 315. Since the moment of silence is not in and of itself a religious activity (but only a moment of privacy in which a student may, if he chooses, engage in a religious activity), it does not create the concerns generated by the *McCollum* program. The classroom is not used for religious instruction or overt religious observance; thus the force of the school is in no way used to promote prayer.

does is to create an opportunity that the students may use, if they wish, for prayer—or for meditation or other quiet contemplation if they prefer. Nothing is asked of a student who wishes not to pray or meditate but that he remain silent, respecting the rights of his fellow students whose views may be different. No one can even know what the other chooses to do.

As was the case in *Zorach*, then, the moment of silence puts religion on a wholly voluntary basis; it simply expands the freedom available to individuals to decide for themselves whether and how to engage in religious practice, without inducing or coercing that choice. The student "is left to his own desires as to * * * his religious devotions, if any." *Zorach*, 343 U.S. at 311.

Further, the moment of silence is perfectly neutral with respect to religious practice:[12] it neither favors one religion over another, nor conveys "endorsement or disapproval of religion." *Lynch* v. *Donnelly*, slip op. 1 (O'Connor, J., concurring); see also *Gaines* v. *Anderson*, 421 F. Supp at 343-344. It thus more than satisfies *Zorach*'s requirement that religious accommodations be "neutral when it comes to competition between sects" (343 U.S. at 314).[13] All major religious faiths recognize

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[12] Of course, a perfect neutrality is not required of efforts to accommodate voluntary religious exercise. In keeping with the special status of religion under the Free Exercise Clause, the government may seek to accommodate or protect religiously-motivated claims of conscience even where it does not accord the same treatment to other strongly-held beliefs. *Marsh* v. *Chambers*, slip op. 17-18 (Brennan, J., dissenting); see, *e.g.*, *Thomas* v. *Review Board*, 450 U.S. 707 (1981); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Gillette* v. *United States*, 401 U.S. 437 (1971).

[13] The practice of providing a moment of silence at the outset of the school day seems substantially less problematic than the released time program upheld in *Zorach*. The *Zorach* program was directed exclusively to the accommodation of specifically religious needs, and only religious students could take advantage of it. Moments of silence, in contrast, are wholly neutral as between religious and nonreligious needs. As the langauge of the statute itself demonstrates, silence makes possible not only religious but

silent prayer as an acceptable form of prayer. C. Whittier, *Silent Prayer and Meditation in World Religions* 7 (Congressional Research Service May 27, 1982).[14] Whatever one's faith, a moment of silence offers an opportunity for personal devotion; yet it is offensive to no one. A better example of "accommodation of all faiths * * * and hostility toward none" (*Lynch* v. *Donnelly*, slip op. 8) would be difficult to find.[15]

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nonreligious contemplation—both "prayer" and "meditation." And by the very nature of silence, the mind can be directed to wholly nontranscendental matters as well—to anything from God to homework to the girl or boy next door. See *Gaines* v. *Anderson*, 421 F. Supp. at 342-343. Thus in no way do moment of silence statutes "confer any imprimatur of state approval of religious sects or practices." *Widmar* v. *Vincent*, 454 U.S. 263, 274 (1981).

[14] The Alabama statute requires no gesture or posture that might limit the usefulness of the moment of silence to adherents of some religions. Cf. *May* v. *Cooperman*, 572 F. Supp. at 1571-1572. The district court in *May* found as a fact that the moment of silence instituted under New Jersey law is unsuitable for prayer by persons of some religious faith (*ibid.*), but provided no examples of religions that do not consider silent prayer as at least *one* acceptable mode. But even assuming that there are such, the court's further conclusion that the moment of silence "prevents others from engaging in 'their form of prayer" (*id.* at 1575) is patently untrue. Adherents of such faiths, like those of no faith at all, remain free to meditate on secular subjects. Their religious liberty, even if not enhanced by the moment of silence, is in no way diminished.

[15] Pluralism in a different sense would also be encouraged by holding that the states *may* provide for a moment of silence. There is no need for nationwide uniformity on the moment of silence. As the district court observed in *May* v. *Cooperman*, 572 F. Supp. at 1568, attitudes toward such an exercise vary markedly from state to state and even from community to community. Experience has shown that in some communities, the moment of silence is widely accepted and useful in promoting its purposes (see, *e.g.*, *id.* at 1566-1567 (Sayreville, New Jersey)); in others, it has led to some resistance (see, *e.g.*, *id.* at 1566-1567 (Princeton, New Jersey)). The Alabama statute (unlike some other state statutes) permits the individual teacher to make the decision whether to conduct the moment of silence, thus enabling teachers to adapt to the par-

To be sure, the moment of silence implicitly presupposes, and thus affirms, the appropriateness of individual contemplative activity in an educational setting; and the Alabama statute (unlike some of the other state statutes [16]) leaves no doubt that religious contemplation is as legitimate as other forms of meditation. But in *Zorach*, the Court rejected the argument that to create an opportunity for religious practice impermissibly throws "the weight and influence of the school • • • behind a program for religious instruction" (343 U.S. at 309). The distinction is between toleration and accommodation on the one hand, and sponsorship and establishment on the other. The moment of silence "endorses" only the view that the religious observances of others should be tolerated and, where possible, accommodated. *Lynch* v. *Donnelly*, slip op. 4.

Finally, the moment of silence occasions no intrusion whatever by the state into church affairs or vice versa (cf. *Lemon* v. *Kurtzman*, 403 U.S. 602, 614 (1971)), and thus entails no interference with "the essential autonomy of religious life" (*Marsh* v. *Chambers*, No. 82-23 (July 5, 1983), slip op. 9 (Brennan, J., dissenting)). In *Zorach*, the released time program required the school district to decide what "religious centers" would qualify for participation, and involved the school in receiving

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ticular needs of the class. See NYU Note App. at 407-408 (classifying state statutes according to whether the moment of silence is required for all classrooms, or if not, whether the discretion is vested in the teacher, the principal, or the school board).

[16] Some state moment of silence statutes include the word "prayer"; some do not. See NYU Note App. at 407-408. We do not believe the presence or absence of the word is constitutionally significant. Compare *Gaines* v. *Anderson*, *supra* (upholding moment of silence statute containing the word "prayer") with *May* v. *Cooperman*, *supra* (striking down moment of silence statute contaning no reference to "prayer" or any other form of religious activity). A statute mentioning prayer as the *only* use of the moment of silence or purporting to prohibit non-religious uses of the time would, of course, present a different question.

written authorizations from parents and weekly attendance reports from churches (343 U.S. at 308). The Court did not find these contacts between governmental and religious authorities to be excessive. Here, not even such minimal contacts exist. Schoolteachers simply decide whether or not to have a moment of silence; there is no interaction with religious authorities and no need for inquiry into religious issues.

B. In Applying the Three-Part Test of *Lemon* v. *Kurtzman*, the Court of Appeals Failed to Distinguish Between Government Efforts to Sponsor Religion and Government Accommodations of the Voluntary Exercise of Religion

The court of appeals devoted little attention in its opinion to the moment of silence provision. All but one paragraph of its 20-page opinion (J.S. App. 18a) dealt with the issues raised by the recitation of spoken prayers (as to which this Court summarily affirmed). We suspect that the moment of silence issue—one of first impression for that court, as it is for this Court—was simply engulfed in the wider waters of the case.

The court of appeals concluded that the moment of silence statute does not satisfy the "purpose" and "effect" prongs of the test set forth in *Lemon* v. *Kurtzman*, *supra*.[17] However, the court's cursory analysis was fundamentally flawed, because the court did not distinguish between government efforts to sponsor (or "establish") a religion and government efforts to accommodate the practice of religion.

1. *Purpose.* Relying on a preliminary finding by the district court on a motion for a preliminary injunction,[18]

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[17] The court made no findings under the "entanglement" prong of the test.

[18] The district court's finding, in turn, was predicated on a single statement by a legislator "that his purpose in sponsoring § 16-1-20.1 was to return voluntary prayer to the public schools. He intended to provide children the opportunity of sharing in their [*sic*]

the court of appeals stated that "[t]he objective of the meditation or prayer statute (Ala. Code § 16-1-20.1) was also the advancement of religion" (J.S. App. 18a). The existence of "this fact" and the "inclusion of prayer [in the text of the statute]" led the court to conclude that the statute "involves the state in religious activities" and demonstrated to the court that there was "a lack of secular legislative purpose on the part of the Alabama Legislature" (*ibid.*).

This reasoning cannot withstand analysis. The principal purpose of the moment of silence statute is not hidden or difficult to discover: it is to create an opportunity for school children at the beginning of the school day to engage in brief silent prayer or meditation. The court concluded that the "purpose" of this was the "advancement of religion." But this is so only in the sense that *any* attempt to facilitate the free exercise of religion "advances" religion. Yet this Court has on numerous occasions considered the legitimacy of government efforts to accommodate religion, and has repeatedly upheld accommodation as a legitimate purpose—even finding, on occasion, that accommodation is constitutionally required. *Lynch* v. *Donnelly*, slip op. 4. See, *e.g.*, *Thomas* v. *Review Board*, *supra*; *Gillette* v. *United States*, 401 U.S. 437 (1971); *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Zorach* v. *Clauson*, *supra*; cf. *United States* v. *Lee*, 455 U.S. 252 (1982); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977).

A government practice of accommodating religious needs also makes an important point about toleration and pluralism. The moment of silence thus serves the wholesome purpose of "fostering harmony and tolerance among the pupils." *Schempp*, 374 U.S. at 280 (Brennan, J., concurring). Ours is a nation of great religious diversity.

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spiritual heritage of Alabama and of this country" (J.S. App. 71d). The district court made no findings regarding legislative purpose in its final decision.

Schoolchildren may reveal their religious background—or lack of it—in the clothing they wear, the food they eat, or the words they utter; religious differences are not likely to be overlooked. Harmony requires, therefore, that we develop habits of mutual respect and toleration for the religious practices of others. The moment of silence provides an opportunity for young people to learn that each individual is free to worship and believe (or not believe) according to the dictates of his own conscience, and that the religious practices of others do not threaten or interfere with their own. The moment of silence is uniquely suited to such a lesson in toleration because of its dual nature—as an opportunity for exercise of faith among those who believe, and a wholly secular occasion for those who do not.[19]

The court of appeals' conclusions about the purpose of the moment of silence statute were based largely on casually phrased testimony in the district court by the provision's sponsor[20] that his purpose was "to return voluntary prayer to the public schools" (J.S. App. 71d). This statement, viewed in the context of the actual bill he introduced, can most plausibly be read as referring to voluntary *silent* prayer. And since the bill also made provision for silent meditation, it seems clear that he hoped to facilitate voluntary silent prayer in a neutral and (we submit) constitutionally unobjectionable manner. That some legislators may have harbored the hope that students would in fact use the opportunity provided for religious ends is not significant, so long as the means chosen by the legislature is found to be within the bounds of permissible accommodation. See *Mueller* v. *Allen*, No. 82-195

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[19] Some states and school administrators have also concluded that a moment of silence is an appropriate way to prepare the children for the serious work of the day, apart from considerations of religious accommodation.

[20] This testimony is not a part of the legislative history of the bill and cannot be considered an authoritative guide to its interpretation under Alabama law. *James* v. *Todd*, 267 Ala. 495, 506, 103 So.2d 19, 28-29 (1957).

(June 29, 1983), slip op. 6; *United States* v. *O'Brien*, 391 U.S. 367, 383 (1968).

Nor should the apparent hostility of some of Alabama's legislators to this Court's decisions in *Schempp* and *Engel* be considered fatal to the constitutionality of the moment of silence. Government officials are required to comply with judicial decisions, not to speak well of them. The moment of silence statute need not be viewed as a "guise" for evading this Court's decisions (J.S. App. 18a); it can more fairly be understood as an attempt—even if a grudging attempt—to comply with them. See *Gaines* v. *Anderson*, 421 F. Supp. at 341.[21]

2. *Effect.* The court of appeals' application of the "effect" aspect of the *Lemon* test is so conclusory as to make it difficult to analyze; however, it appears to mirror that court's "secular purpose" analysis. The court's "hold-[ing]" that "the state cannot participate in the advancement of religious activities" fails to distinguish between state actions that "advance" religion by coercing, sponsoring, or inducing it, and those that "advance" religion merely by removing obstacles or creating opportunities for its exercise. This profound distinction between en-

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[21] It is neither unusual nor suspicious that legislatures should pursue their policies by other means when one approach has been invalidated by the courts. See, *e.g.*, *Wolman* v. *Walter*, 433 U.S. 229, 233 (1977) (footnote omitted) ("Section 3317.06 [Ohio Rev. Code Ann. (Supp. 1976)] was enacted after this Court's May 1975 decision in *Meek* v. *Pittenger*, *supra*, and obviously is an attempt to conform to the teachings of that decision."); *Bellotti* v. *Baird*, 443 U.S. 622, 625 (1979) (after *Roe* v. *Wade*, 410 U.S. 113 (1973), state legislature passed a statute "intended to regulate abortions 'within present constitutional limits' "). Under most circumstances, the state may not merely reenact the same statute with a bowdlerized legislative history purporting to establish a legitimate public purpose (cf. *Palmer* v. *Thompson*, 403 U.S. 217, 225 (1971)); however, where the state adopts a provision that is substantively distinguishable from the prior legislation (as a moment of silence is from the prior school prayer and Bible reading exercises), the new provision should be considered on its own merits and not deemed unconstitutional simply because it was passed as a substitute for invalidated legislation.

dorsing a particular point of view and creating a neutral forum for expressive activity is at the heart of First Amendment law (see *Widmar* v. *Vincent*, 454 U.S. 263, 273 (1981), and can be ignored only at the cost of stifling the exercise of First Amendment rights.

3. In sum, the court of appeals' application of the *Lemon* test would result in invalidating *all* government actions that have the purpose or effect of facilitating or accommodating religious observance. It creates a tension with this Court's many decisions upholding, and in some cases requiring, religious accommodations—and with the Free Exercise Clause itself. For "the Constitution • • • affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch* v. *Donnelly*, slip op. 4. We have recently noted in this Court [22] the problematic nature of using the purpose and effect tests of *Lemon* in the context of determining the legitimacy of practices that seek to accommodate voluntary religious exercise. In any event, those tests should, in light of this Court's religious accommodation decisions, be interpreted in a maner that affirms that the *purpose* of religious accommodation is constitutionally legitimate, and that the *effect* of such accommodation, if appropriately neutral and voluntary, is no less so.

C. Other Objections Raised to the Moment of Silence Are Not of Constitutional Dimension

Certain other objections have been raised by courts and commentators to observing a moment of silence in the public schools. Although not relied on by the court below, several of these warrant brief discussion.

1. The moment of silence is alleged to be unnecessary: "inasmuch as every student always retains the right to pray silently whenever the student so chooses, the meditation or prayer statute is not necessary to 'accommodate' that right." Br. of American Civil Liberties Union as

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[22] See Br. for the United States as Amicus Curiae in *Estate of Thornton* v. *Caldor, Inc.*, *supra*, at 24-29.

Amici Curiae in Support of Appellee's Motion to Dismiss or Affirm at 11; see also Harvard Note at 1885.

As far as it goes, this observation is true: silent prayer can occur without a formal moment of silence. (We recall the jest that children will continue to pray in school as long as there are algebra tests.) Necessity, however, is not the standard. Approximately half of the states have judged it appropriate to accommodate the religious needs of schoolchildren by providing an opportunity to pray during a formal moment of silence. Their reasons for doing so are substantial and should not be casually disparaged.

The principal advantage of the moment of silence is that it produces silence. Schoolchildren may be *able* to meditate or pray during the hustle-bustle of lunch, or on the playground, or during a lull in classroom activity. But surely all contemplative activity, including prayer, is enhanced if outside distractions are momentarily stilled.

The liberating aspect of the moment of silence also should not be overlooked. Many people, even religious people, especially children, find it somewhat embarrassing to be caught in the act of prayer. A student who wanders off by himself on the playground in order to offer up a brief prayer, or who lapses into a reverent silence at the lunch table, might well be the brunt of jokes and intimidation. If all are silent, then all are free to pray or meditate as they choose, without having to appear "different." Cf. *Schempp*, 374 U.S. at 208 n.3.

In any event, most forms of religious accommodation are subject to the objection that they are "unnecessary." The students involved in *Zorach* could have found time in the evening or at dawn to engage in religious instruction, without benefit of the released time program; the employees of church-operated schools in *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981) could probably afford to pay unemployment taxes (cf. *United States* v. *Lee*, *supra*); there is no indication that parents in *Mueller* v. *Allen*, *supra*, could not send their children to religious schools without tax deductions.

How serious is the need for a particular religious accommodation (where not required by the Free Exercise Clause) is primarily a question of public policy, for legislatures to assess. See *United States* v. *Lee*, 455 U.S. at 259-261; *Zorach* v. *Clauson*, 343 U.S. at 310, 314.[23] The Religion Clauses do not restrict religious accommodation to cases where the exercise of religion without the accommodation becomes impossible; their purpose is to *facilitate* the free and voluntary exercise of religion, not to restrict it to an inhospitable and grudging minimum.

2. A more substantial objection is that the moment of silence might be administered in an unconstitutional manner. A teacher might, for example, preface the moment of silence with an explanation that would tend to indoctrinate or induce students to use the time for prayer. *Beck* v. *McElrath*, 548 F. Supp. at 1165. Another teacher might insist upon a bowing of the head or a folding of the hands, gestures that convey a specifically religious symbolism. *May* v. *Cooperman*, 572 F. Supp. at 1567, 1571.

These speculations, however, are not pertinent to this case, which raises solely a challenge to the constitutionality of Alabama's moment of silence law on its face. Because implementation of the statute has been enjoined since shortly after its passage, there is no record of how the moment of silence would be administered.

With certain exceptions not relevant here, a law must be sustained on a facial challenge so long as there are nontrivial examples of permissible application. It cannot be struck down merely because some applications of it might be unconstitutional. See *Kleppe* v. *New Mexico*, 426 U.S. 529, 546 (1976); *Zorach*, 343 U.S. at 311 & n.7. If some teachers or school districts abuse the moment of silence, a challenge can be brought in that concrete factual context. See *New York* v. *Ferber*, 458 U.S. 747, 767-768 (1982); *United States* v. *Raines*, 362 U.S. 17, 20-22 (1960).

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[23] See note 7, *supra*.

3. It is sometimes suggested that the moment of silence coerces the unwilling student into "participating" in a "State prescribed religious observance." *May* v. *Cooperman*, 572 F. Supp. at 1571; see also *Duffy* v. *Las Cruces Public Schools*, 577 F. Supp. at 1022. This is true, according to one court, even when the student is not induced to pray, because the moment of silence in itself "requires all students to assume a posture identified as the posture of prayer of certain religious groups." *May* v. *Cooperman*, 572 F. Supp. at 1571. This forces the students "to decide whether * * * [to] submit to an exercise which violated their beliefs or whether they should separate themselves from their peers." *Id.* at 1576.

This, we submit, is pure nonsense. Silence in itself is not a religious exercise in which one is forced to "participate"; it is merely a private moment, to be used as one wishes, for religious or nonreligious contemplation. As the court observed in *Gaines* v. *Anderson*, 421 F. Supp. at 345, "[i]f a student's beliefs preclude prayer in the setting of a minute of silence in a schoolroom, he may turn his mind silently toward a secular topic, or simply remain silent, without violating the statute * * * or facing the scorn or reproach of his classmates." [24]

D. This Court Has Rejected the Absolutist Approach to the Establishment Clause That Would Require Elimination of All Religious Elements From Our Public Life

The moment of silence faces still another objection, generally unstated but no less serious: some children will actually use the opportunity to pray. No matter that

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[24] A study was performed of the moment of silence as practiced in a New Mexico school district. Based on televised observations of student reaction and structured interviews, the researchers concluded that up to 20% of the students "assumed positions which could be interpreted as having the probability of being a religious act," but that "most persons viewed the moment of silence as simply silence and not as prayer." *May* v. *Cooperman*, 572 F. Supp. at 1568 (footnote omitted).

children are equally free to meditate, or daydream, or doze; no matter that none is coerced, intimidated, or indoctrinated in any fashion. The prospect that some individuals could openly (even if silently) pray *in a public school* is inconsistent with the "absolutist approach" to the Establishment Clause (*Lynch* v. *Donnelly*, slip op. 8) that this Court has frequently confronted. The animating ideal of that approach is a pristinely secular society in which all public manifestations of religious faith and practice are deemed *inappropriate*; where religion, if it is to be practiced at all, is relegated to the purely private sphere of home and church. That approach demands not neutrality and pluralism but a rigorous extirpation of religious elements from public occasions, no matter how minor, traditional, evenhanded, noncoercive, or inoffensive they may be. See, *e.g.*, *Lynch* v. *Donnelly*, *supra*; *Marsh* v. *Chambers*, *supra*; *Widmar* v. *Vincent*, *supra*; *O'Hair* v. *Andrus*, 613 F.2d 931 (D.C. Cir. 1979). It exemplifies an attitude "partak[ing] not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring).

This Court, however, has consistently affirmed constitutional ideals that "rest on and encourage *diversity* and *pluralism* in all areas" (*Lynch* v. *Donnelly*, slip op. 8 (emphasis added)), and that give due respect to religious observances that have "become part of the fabric of our society" (*Marsh* v. *Chambers*, slip op. 9). See also *Lynch* v. *Donnelly*, slip op. 5-8. It has repeatedly rejected, both explicity and implicitly, the notion "that the Establishment Clause of the First Amendment not only mandates religious neutrality on the part of government but also requires that this Court go further and throw its weight on the side of those who believe that our society as a whole should be a purely secular one." *Meek* v. *Pittenger*, 421 U.S. 349, 395 (1975) (Rehnquist, J.,

dissenting). From the famous dictum that "[w]e are a religious people whose institutions presuppose a Supreme Being" (*Zorach* v. *Clauson*, 343 U.S. at 313) to the recent affirmation of the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life" (*Lynch* v. *Donnelly*, slip op. 5), this Court has resisted efforts to use "[t]he Establishment Clause * * * as a sword to justify repression of religion or its adherents from any aspect of public life." *McDaniel* v. *Paty*, 435 U.S. at 641 (Brennan, J., concurring) (footnote omitted).

It is true that religious practice makes some people uncomfortable: "there are those who profess no religion and to whom any form of prayer is offensive" (*May* v. *Cooperman*, 572 F. Supp. at 1575). But the Constitution does not protect against the observance *by others* of religious beliefs with which we disagree. Cf. *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940). And we have no right to demand that *their* thoughts and words, because they are religious in nature, should be excluded from schools or other public places (*Widmar* v. *Vincent*, *supra*), placed under special burdens or inhibitions (*McDaniel* v. *Paty*, *supra*), or denied the benefit of the government's acknowledged power to encourage and give free rein to voluntary First Amendment activity (*Heffron* v. *International Society for Krishna Consciousness*, 452 U.S. 640 (1981)). The Establishment Clause does not require students to shed their religious beliefs and practices at the schoolhouse gate for fear of offending their fellows. Cf. *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969).[25]

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[25] Some courts seem to be moved by a nervous overestimation of the seductive and coercive power of religious expression—an attitude which stands in striking contrast to the view frequently expressed in other contexts that our people do not need to be shielded from uninhibited and robust expression. Compare *Brandon* v. *Board of Education*, 635 F.2d 971, 973 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981) (voluntary student religious group may not meet on school grounds before school; impressionable

The special character of the public school classroom justifiably makes us especially sensitive to possible Establishment Clause problems in that setting. But we should be sensitive to the need for toleration and accommodation in the schoolhouse as well as to the need for voluntarism and neutrality. We should nurture and encourage efforts to widen rather than narrow the liberty of religious exercise.[26]

Attendance at elementary and secondary schools is compulsory, and it constitutes a major portion of the pupils' time and activity. To those who regard prayer as intrinsic to all of their activities, the opportunity for prayer at school assumes a special importance. The values of pluralism and diversity in our public schools suffer needlessly from a reading of the Establishment Clause that destroys the possibility of accommodating, in a spirit of toleration, voluntary religious practices of the sort involved in this case.

Moment of silence statutes are libertarian in the precise spirit of the Bill of Rights. This is best illumined simply by visualizing a classroom of schoolchildren who have, pursuant to the Alabama statute, been asked to be silent for one minute to open their school day. From the viewpoint of the Constitution, has anything gone *wrong* here? All we know with certainty is that, for one minute, there has been no noise, that each child has been made to be alone with his thoughts. If a child uses this moment of

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youngsters will be vulnerable to peer pressure and to perceptions of official endorsement of religion), with *Gambino* v. *Fairfax County School Board*, 429 F. Supp. 731, 736-737 (E.D. Va. 1977); *Bayer* v. *Kinzler*, 383 F. Supp. 1164 (E.D. N.Y. 1974), aff'd, 515 F.2d 504 (2d Cir. 1975) (school authorities may not prevent student newspaper from printing articles on sexual activity and birth control; authorities' fears that official status of newspaper could lead to undue pressure or misunderstanding by students unfounded).

[26] It was precisely in the context of public schools that this Court commended efforts to encourage and cooperate with the religious needs of students as "follow[ing] the best of our traditions." *Zorach*, 343 U.S. at 314.

silence, privately, to dedicate himself to God, nothing in the spirit of the Constitution has been offended. All we have done is to accommodate those who wish to pray, and we have done so in the most neutral and noncoercive spirit possible. To hold that the moment of silence is unconstitutional is to insist that any opportunity for religious practice, even in the unspoken thoughts of schoolchildren, be extirpated from the public sphere. It is to be censorial where the Religion Clauses are libertarian; it is inconsistent with our national commitment to freedom and tolerance.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WALLACE, et al., *Appellants,*

—v.—

JAFFREE, et al., *Appellees.*

SMITH, et al., *Appellants,*

—v.—

JAFFREE, et al., *Appellees.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE ALABAMA CIVIL LIBERTIES UNION AND THE NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

WHETHER THE ALABAMA MEDITATION-OR-PRAYER STATUTE VIOLATES THE ESTABLISHMENT CLAUSE INASMUCH AS IT WAS ENACTED WITH A RELIGIOUS PURPOSE, WILL HAVE A RELIGIOUS EFFECT AND ITS RELIGIOUS DESIGN DOES NOT "ACCOMMODATE" ANY BURDEN ON THE FREE EXERCISE OF RELIGION.

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United States v. Seeger, 380 U.S. 163 (1965) 24

Walz v. Tax Commission, 397 U.S. 664 (1976) 34,35

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OTHER AUTHORITIES

Ala. Code § 16-1-20 .....passim

Ala. Code § 16-1-20.1 .....passim

Ala. Code § 16-1-20.2.....8,14,55

42 U.S.C. § 2000e.....17

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INTEREST OF AMICI [1]

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members dedicated to preserving and defending the principles embodied in the Bill of Rights. The Alabama Civil Liberties Union is the Alabama affiliate of the ACLU. The ACLU and its affiliates are committed to protecting both the individual freedom to worship and the principle of government neutrality in matters of religion embodied in the two Religion Clauses of the First Amendment. The ACLU and its affiliates have been involved either directly, or as amicus, in many of the leading First Amendment Religion Clause cases in this Court and throughout the country.

The National Coalition for Public Education and Religious Liberty is a national

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[1] The written consent of all parties to the filing of this brief has been submitted to the Clerk.

coalition of organizations sharing the common objectives of preserving religious freedom and the separation of church and state in public education.[2/]

STATEMENT OF THE CASE

This lawsuit -- which began as a challenge to the pervasive religious practices in Alabama public schools -- has been nar-

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[2/] The consitutuents of National PEARL are: American Association of School Administrators; American Civil Liberties Union; ACLU National Capital Area; ACLU of Connecticut; American Ethical Union; American Federation of Teachers, AFL-CIO; American Humanist Association; American Jewish Congress; Americans for Religious Liberty; Americans United for Separation of Church and State; Anti-Defamation League of B'nai B'rith; Baptist Joint Committee on Public Affairs; Board of Church and Society of the United Methodist Church; Central Conference of American Rabbis; Illinois PEARL; Michigan Council About Parochiaid; Minnesota Civil Liberties Union; Missouri Baptist Christian Life Commission; Missouri PEARL; New York PEARL; Monroe County, New York PEARL; Nassau-Suffolk PEARL; Michigan Council Against Parochiaid; National Association of Catholic Laity; National Council of Jewish Women; National Education Association; National Women's Conference; Preserve Our Public Schools; Public Funds for Public Schools of New Jersey; New York State United Teachers; Ohio Free Schools Association; Union of American Hebrew Congregations; Unitarian Universalist Association.

rowed on appeal to only one issue: the constitutionality of Ala. Code, § 16-1-20.1, Alabama's "Meditation-or-Prayer Statute."

However, although that legal question now stands alone, it cannot be decided in isolation from the factual circumstances of this case in its entirety. That complete factual record reflects the purposes and effects of the Meditation-or-Prayer Statute as it was actually promulgated and perceived in Alabama, and not as some other statute might have been enacted in idealized circumstances.[3/]

[3/] The appellants, and the United States as amicus, seek to transform this case from a narrow review of the Alabama Meditation-or-Prayer Statute, with its unique factual history and evidentiary record, into a comprehensive ruling encompassing all state statutes providing for a minute of silence regardless of history or circumstances. Brief of Appellant George Wallace (hereinafter "Br. of Gov. Wallace"), at 14, Brief of the United States as Amicus Curiae Supporting Appellants, (hereinafter "Br. of U.S."), at 12, et seq. However, appellees have limited their argument, as do amici, to the sole contention that when the Alabama statute is measured against ap-
(footnote continued)

A. THE MEDITATION-OR-PRAYER STATUTE

The Alabama Meditation-or-Prayer Statute[4] was enacted in 1981. However, that statute is not the only Alabama legislation concerning silence in public school classrooms: In 1978, Alabama enacted Ala. Code § 16-1-20, a "Meditation Statute" providing solely for silent meditation, without any mention of prayer.[5]

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propriate constitutional standards it should be adjudged to violate the Establishment Clause. The constitutionality of other minute-of-silence statutes can be assessed only in the context of the factual circumstances in which they are enacted and applied.

[4] The Meditation-or-Prayer Statute provides, in its entirety, as follows:

"At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in."

[5] That Meditation Statute provides, in its entirety, as follows:

"At the commencement of the first class each day in the first through the sixth grades in all (footnote continued)

The plaintiffs -- who had first initiated this action to enjoin the vocal, group prayer activities conducted by public school teachers in Mobile County, Alabama (see discussion infra) -- challenged the constitutionality of the Meditation-or-Prayer Statute in their Second Amended Complaint (J.A. 21). In response, Governor James' Answer (J.A. 37)[6] admitted the following relevant facts:

-that the legislature enacted the Meditation-or-Prayer Statute to "clarify its intent to have prayer as part of the daily classroom activity;"[7]

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public schools, th teacher in charge of the room in which each such class is held shall announce that a period of silence, not to exceed one minute in duration, shall be observed for meditation, and during any such period silence shall be maintained and no activities engaged in."

[6] The other defendants named in the Second Amended Complaint denied all of its material allegations (J.A. 30).

[7] Compare, Second Amended Complaint, ¶32(d)(J.A. 24-5), with Governor's Answer to ¶32(d)(J.A. 40).

-that the "expressed legislative purpose in enacting Section 16-1-20.1 (1981)[the Meditation-or-Prayer Statute] was to 'return voluntary prayer to (Alabama's) public schools;'"[8]

-that the teacher defendants "have led their classes in prayer pursuant to the authority of God...as well as Alabama Code § 16-1-20 [the Meditation Statute]" [9], and the Governor makes substantially the same admission as to the Meditation-or-Prayer Statute.[10]

The meaning and purpose of the Meditation-or-Prayer Statute were further illuminated by its legislative sponsor, Senator Donald Holmes, who inserted in the legislative record, without objection, a Statement which is part of the legislative history of the statute. That Statement articulates only one reason for the Meditation-or-Prayer

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[8] Compare, Second Amended Complaint, ¶32(e)(J.A. 25), with Governor's Answer to ¶32(e)(J.A. 40).

[9] Compare, Second Amended Complaint, ¶¶32(b) and (c)(J.A. 24), with Governor's Answer to ¶¶32(b) and (c)(J.A. 40).

[10] Compare, Second Amended Complaint, ¶¶32(f) and (g)(J.A. 25), with Governor's Answer to ¶¶32(f) and (g)(J.A. 40).

Statute: to reintroduce prayer, and promote religion, in the public schools.[11]/

The legislative purpose of the Meditation-or-Prayer Statute can be further discerned from the testimony of Senator Holmes at the preliminary injunction hearing (J.A. 43, et seq.). He explained that he wrote and sponsored that statute because, at the time, "all we had was a silent meditation law on the books" and he wanted to get "voluntary prayer" back in the schools (J.A. 48

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[11]/ In pertinent part, Senator Holmes stated:

"Gentlemen, by passage of this bill by the Alabama Legislature our children in this state will have the opportunity of sharing in the spiritual heritage of this state and this country. The United States as well as the State of Alabama was founded by people who believe in God. I believe this effort to return voluntary prayer to our public schools for its return to us to the original position of the writers of the Constitution, this local philosophies and beliefs hundreds of Alabamians have urged my continuous support for permitting school prayer [sic]. Since coming to the Alabama Senate I have worked hard on this legislation to accomplish the return of voluntary prayer in our public schools and return to the basic moral fiber" (J.A. 50).

and 51).[12] Moreover, after conceding that explicitly religious purpose, Senator Holmes also admitted that he had no secular purposes for the statute.[13]

After hearing that evidence, and in the absence of any contrary proof of purpose by

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[12] The phrase "voluntary prayer" has long been used by proponents of public school religious practices to mean in-school, government-initiated, vocal group prayer of precisely the sort which this court held violated the Establishment Clause. School District of Abington Township v. Schempp, 374 U.S. 203 (1963).

Thus, in context, it is clear Senator Holmes intended "voluntary prayer" to mean vocal teacher-led group prayer such as existed when the Senator was in school: "I had prayer in school when I was in the Sixth Grade. I still have my Sixth Grade Bible that my teacher gave me" (J.A. 48.). Similarly, the Senator characterized Ala. Code §16-1-20.2 (which provided for such vocal, group prayer activities in the public school), as the "Voluntary Prayer Bill," and described it as providing only for "voluntary prayer in our public schools" (J.A. 46).

[13] Senator Holmes testified as follows:

"Q Did you have any non-religious or secular purpose for proposing this particular bill, Senate Bill Sixteen, the 1981 bill [Ala. Code 16-1-20.1]? ....

A [Senator Holmes] No, I did not have no other purpose in mind [sic]" (J.A. 51-52).

the defendants, the district court made the factual finding that "[t]he enactment of ... §16-1-20.1 [the Meditation-or-Prayer Statute] is an effort on the part of the State of Alabama to encourage a religious activity," Jaffree v. James, 544 F.Supp. 727, 732 (S.D. Ala. 1982), and it preliminarily enjoined the statute.

The district court later dismissed plaintiffs' case,[14] but the Court of Appeals unanimously rejected the district court's analysis and concluded that the Meditation-or-Prayer Statute violated the Establishment Clause. Jaffree v. Wallace, 705 F.2d 1526, 1535-36 (11th Cir. 1983).[15]

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[14] The district court decision was based on the long discredited contention that the First Amendment does not prohibit a State establishment of religion and, in any event, the Fourteenth Amendment does not incorporate First Amendment prohibitions against the states. Jaffree v. James, 554 F.Supp. 1130 (S.D. Ala. 1983), incorporating by reference, Jaffree v. Board of School Commissioners, 554 F.Supp. 1104 (S.D. Ala. 1983).

[15] Four judges later dissented from the denial of (footnote continued)

That Court of Appeals decision quotes, and relies on, the record of the district court proceedings "where it was established that the intent of the statute was to return prayer to the public schools," id., at 1535, and the district court finding of fact that the objective of the statute "was ... the advancement of religion." Id. The decision also recognizes that the difference between the Meditation Statute and the later enacted Meditation-or-Prayer Statute further supports the factual conclusion that the Meditation-or-Prayer Statute was enacted for religious purposes: "... the inclusion of prayer obviously involves the state in religious activity." Id.

Thus, when all that evidence was considered, along with the absence of any con-

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the petition for rehearing en banc as to the Meditation-or-Prayer Statute. Jaffree v. Wallace, 713 F.2d 614 (11th Cir. 1983).

trary evidence, the court found "a lack of secular legislative purpose on the part of the Alabama Legislature" and that "the statute has the primary effect of advancing religion." Id. The Court of Appeals decision was brief (see, Br. of U.S., at 20) because the relevant factual findings left little need for extended discussion.

The defendants appealed, and this Court noted probable jurisdiction. ___ U.S. ___ (1984).

B. PUBLIC SCHOOL RELIGIOUS PRACTICES

Ishmael Jaffree sends his three children to the public schools in Mobile County, Alabama, where vocal, Christian religious practices have been routinely conducted by teachers in the classroom.[16] Despite Jaf-

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[16] The evidence presented at trial established that public school teachers led their classes in daily devotionals consisting of the public recitation of the Lord's Prayer, and other religious, particularly Christian, songs and prayers. See e.g., 544 F.Supp., at 1106-8, and 705 F.2d, at 1528-29.

free's repeated complaints that such religious practices were offensive to him as a matter of his own conscience, his children's teachers and the supervisory public school officials ignored Jaffree's requests that such religious activities be terminated.

Because of their indifference to the plaintiff's beliefs and religious preferences, and flagrant disregard of school board policy regarding religious instruction,[17] the Jaffree children were compelled to endure the ostracism of their classmates

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[17] The policy on religious instruction adopted by the Board of School Commissioners of Mobile County -- which is not even particularly stringent -- provides as follows:

"RELIGIOUS INSTRUCTION

Schools shall comply with all existing state and federal laws as these laws pertain to religious practices and the teaching of religion. This policy shall not be interpreted to prohibit teaching about the various religions of the world, the influence of the Judeo-Christian faith on our society, and the values and ideals of the American way of life." Quoted by the district court, 554 F.Supp., at 1108.

and the offensive religious indocrination of their teachers. (See, the Verified Complaint, J.A. 3, as twice amended, J.A. 17 and 21.) Jaffree was forced to bring suit to enjoin those religious practices, and for damages.

After preliminary proceedings and full trial on the merits, the district court dismissed the complaint on the grounds that this Court was wrong in concluding that public school prayer activities violated the Establishment Clause, and that the Court was also wrong that the First Amendment prohibitions were applicable to the states. 544 F.Supp. 1104. On appeal to the Eleventh Circuit, the reasoning of the district court decision was unanimously reversed, and the Mobile County public school religious practices were declared unconstitutional, 705 F.2d 1526. This Court declined to review that decision. ___ U.S. ___ (1984).

C. THE SCHOOL PRAYER STATUTE

In 1982, the Alabama legislature enacted a statute providing that any teacher or school, "recognizing that the Lord God is one," at the beginning of any public school class, may engage in any prayer activities or, alternatively, lead students in a specific prayer recited in the statute. Ala. Code §16-1-20.2.[18] That "School Prayer Statute" was promoted by then Governor Fob James (whose son composed the statutory

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[18] The full text of the School Prayer Statute is as follows:

"From henceforth, any teacher or professor in any public educational institution within the state of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may pray, may lead willing students in prayer, or may lead the willing students in the following prayer to God:

Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools in the name of the Lord. Amen."

prayer) and enacted with much public fanfare as a means of repudiating the Establishment Clause prohibitions articulated by this Court. See e.g., Birmingham Post-Herald, July 13, 1982; Montgomery Advertiser, July 13, 1982.

Moreover, after the district court preliminarily enjoined any implementation of that statute, 544 F.Supp. 727, Governor James publicly urged Alabama school officials and teachers to "ignore this federal court injunction" and to "proceed with prayer in the classroom."[19] In fact, the Governor went so far as to "dare" the federal courts to take any action against

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[19] The Governor was quoted as saying:

"I am today encouraging all Alabama school officials, as well as the people of Alabama, to stand on their constitutional rights, to ignore this federal court injunction and to proceed with prayer in the classrooms, with blessings at mealtime and with any other heart-felt prayer which the citizens of Alabama may wish to say." Birmingham Post-Herald, September 27, 1982.

his flagrant contempt, and he promised state support to educators if they should be fined or held in contempt. Birmingham Post-Herald, September 16, 1982.

Despite that flagrant disdain for the Constitution and the courts expressed by the highest officials of Alabama, and despite the clear, binding precedent of this Court, the district court later dismissed the challenge to the School Prayer Statute for the same reasons described supra. 544 F.Supp. 1130. Both the reasoning and the holding of that district court decision were later unanimously reversed by the Eleventh Circuit, 705 F.2d 1526, and that Court of Appeals decision was summarily affirmed by this Court. ___ U.S. ___ (1984).

SUMMARY OF ARGUMENT

I. ACCOMMODATION

The doctrine of accommodation is

properly invoked only when the free exercise of an individual's religion is burdened by the government in the legitimate conduct of its business.[20] Although accommodation then works to accord religious practice special treatment, it is justified because undertaken for the limited purpose of assuring that a person fares no worse for being religious than a non-religious person sub-

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[20] Private, as opposed to government, action may also create a burden on the free exercise of religion. The doctrine of accommodation may then, similarly, permit the state, consistently with the dual dictates of the Religion Clauses, to assure that free excercise values are protected. For example, the "religious accommodation" provisions of Title VII, 42 U.S.C § 2000e, constitutionally protect free exercise values from unreasonable burdens imposed in the private employment context. See also, Estate of Thornton v Caldor, Inc., cert. granted, No. 83-1158 (March 5, 1984) and Br. of American Civil Liberties Union, et al., as Amicus in Support of Petitioner, at 7-20. However, whether accommodation is mandatory or permissive, and whether it operates in the public or private sector, it must always be triggered by a burden to the free exercise of religion.

Inasmuch as this case does not involve any alleged private burdens to religious practice, this brief will focus exclusively on accommodation as it applies in the context of governmental affairs.

ject to the same government regulation. Thus, accommodation, in the sense of that tolerant reconciliation of competing constitutional interests, best reflects the multiple values embodied in the Religion Clauses of the First Amendment.

However, when the government reaches out to assist religious practices not otherwise threatened by any impediment, then it has embraced religion as an official government policy. To call that "accommodation" would provide the government license to abandon its posture of neutrality towards religion in contravention of the great wisdom codified in the Establishment Clause.

In this case, prior to enactment of the Meditation-or-Prayer Statute, Alabama public school students did not suffer any impediment to their right to the free exercise of silent prayer. And Alabama enacted the Meditation-or-Prayer Statute,

not to assure neutrality by relieving a burden on religion, but rather to circumvent the constitutional requirement of religious neutrality.

II. PURPOSE AND EFFECT

The limitations on governmental advancement, endorsement and promotion of religions are nowhere more important, nor more rigorously enforced, than in our nation's public schools. Given the youth, and the mandatory presence, of students in the public schools, they are particularly vulnerable to majoritarian pressures for religious conformity, as well as the scorn and ostracism inflicted on the nonconformist. The resulting conflict, divisiveness and alienation thoroughly undermine the educational mission of the public schools, and engender precisely that sectarian factionalism in the community that the Establishment Clause was designed to avoid.

In this case, the evidence is overwhelming that the Alabama Meditation-or-Prayer Statute was enacted for explicitly religious purposes. It was designed specifically to announce that Alabama has once again put religion into its public school school classrooms as a matter of official government policy.

Furthermore, the religious purposes of the statute -- which were widely proclaimed by Alabama officials -- will necessarily occasion religious effects in Alabama public school classrooms. Even in the best of circumstances, it would be difficult enough for a teacher to announce and implement a period of silence for meditation or prayer with the neutrality and the respect for diversity that appellants concede is constitutionally required. However, when the government itself interjects the politics of religion into the public schools and conveys

the message that "neutrality" is a mere technicality to be used as a subterfuge for the advancement of religion, then the religious effects the government itself is promoting are certain to occur.

Therefore the statute should be held to violate the First Amendment because of both its religious purpose and effect.

I.

THE ALABAMA MEDITATION-OR-PRAYER STATUTE WAS ENACTED SPECIFICALLY TO PROMOTE RELIGIOUS PRACTICES IN ALABAMA PUBLIC SCHOOLS, WHERE THERE EXIST NO STATE IMPOSED IMPEDIMENTS TO PRIVATE INDIVIDUAL DEVOTIONAL INTROSPECTION OR PRAYER, AND THEREFORE THE MEDITATION-OR- PRAYER STATUTE IS NOT A PERMISSIBLE "ACCOMMODATION," BUT RATHER AN UNCONSTITUTIONAL ESTABLISHMENT OF RELIGION.

A. INTRODUCTION

"Accommodation" is the conceptual fulcrum of the arguments advanced in support of the Alabama Meditation-or-Prayer Statute.[21/] Properly conceived, the doctrine

of accommodation is a narrowly crafted analytical framework for reconciling real conflicts between Free Exercise and Establishment values. When invoked to that end, accommodation quite properly permits the favored treatment of religion in order to relieve a burden on its free exercise, and to assure that the neutral equality which is the promise of the Religion Clauses is realized, in fact, by even the most religious among us.

The appellants, and their supporting amici, seek to transform accommodation by allowing it to be invoked even in the absence of any impediment to the free exercise of religion. If used in that sense, however, the government favored treatment of religion would not "accommodate" religion, because no rights needing accommodation are

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21/ See especially, Br. of U.S., at 9-18, and Br. of Gov. Wallace, at 16-30.

infringed. Rather, accommodation then becomes just a pretext for permitting the governmental advancement of religion, and the promotion of particular religious practices such as prayer.

Such a distortion of accommodation doctrine would effect a reversal of long-standing Establishment Clause restraints on governmental endorsement and advancement of religion. It should be rejected by this Court because it would permit an excessive involvement of government and religion, while serving no legitimate secular governmental functions.

B. THE ACCOMMODATION DOCTRINE STRIKES THE BALANCE BETWEEN CONFLICTING TENSIONS OF THE FREE EXERCISE AND ESTABLISHMENT CLAUSES OF THE FIRST AMENDMENT

The doctrine of accommodation is the constitutional mechanism for resolving the tension between the imperatives of individual religious conscience protected by the Free Exercise Clause, and some conflicting

governmental mandate being applied without regard to religion, as normally demanded by the Establishment Clause. See e.g., Thomas v. Review Board, 450 U.S. 707 (1981), Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972), and United States v. Seeger, 380 U.S. 163 (1965).

Thus, accommodation exempts an individual invoking sincere religious scruples from a government rule of general applicability, when that general rule significantly impairs the free exercise of religion. Such special deference to religious practice is constitutionally fitting -- despite "the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause," Wisconsin v. Yoder, supra, at 220-21 -- only because necessary to overcome a corresponding impediment to religious

exercise created by the government itself.

For example, in Sherbert v. Verner, supra, and Thomas v. Review Board, supra, the state unemployment insurance program was governed, in part, by a general rule that benefits were not available if the employee was voluntarily unavailable for employment. See, Sherbert, supra, at 400-401, and Thomas, supra, at 709. In both cases, the employees were voluntarily unavailable within the meaning of the state program, but only because of the demands of their religious conscience and practice.

To refuse unemployment insurance in those circumstance would be "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith [and] effectively penalizes the free exercise of her constitutional liberties." Sherbert, supra, at 406. Thus, the Court properly

concluded in both cases that the otherwise neutral state program must accommodate the needs of religious dictates by way of an exemption from the general rule. Moreover, although that exemption was "in a sense, a 'benefit' to [the individual] deriving from his religious beliefs," Thomas, supra, at 719, it was not an establishment because it "manifests no more than the tension between the two Religion Clauses ... [and] 'reflects nothing more than the governmental obligation of neutrality in the face of religious differences ...'" Id., at 719-20, quoting Sherbert, supra, at 409.[22/]

22/ The same principle of accommodation was applied in the context of compulsory public education, where a facially neutral state requirement that all children receive schooling until the age of 16, substantially interfered with the religious dictates of the Amish. Wisconsin v. Yoder, supra. There, again, this Court recognized that "[a] regulation neutral on its face may, in it application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." Id., at 220. Thus, the Court accommodated the Amish religious needs by providing a limited exemption from the compulsory education (footnote continued)

However, where an individual confronts no interference with the practice of his or her faith, then a government program to promote that faith or facilitate the religious practice cannot be explained as an "accommodation" of competing constitutional interests, because in such a case there are no Free Exercise values abridged. Where an individual is not forced to choose between secular and sectarian authority, a government program specifically designed to promote or advance religious activity necessarily constitutes an establishment of religion, in controvention of longstanding First Amendment principles. For example, although a government-imposed system of compulsory education cannot operate to deprive parents of the power to send their

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law. Also, compare McCollum v. Board of Education, 333 U.S. 203 (1948), with Zorach v. Clausen, 343 U.S. 306 (1952).

child to a private religious school, Pierce v. Society of Sisters, 268 U.S. 510 (1925), nonetheless a government program to help parents provide their children with that religious education would properly be held to violate the Establishment Clause. Lemon v. Kurtzman, 403 U.S. 602 (1971).

The United States, as amicus, and the appellants, are asking the Court to abandon the logic of that distinction by "unleashing" accommodation. As they would have it, the doctrine would allow a state -- as so euphemistically described by the United States -- to "expand opportunities for voluntary religious exercise" (Br. of U.S., at 12) even if religion is not directly burdened by the government. Their proposed use of accommodation is not controlled by any standards nor subject to any limits; it is a legal conclusion, rather than a constitutional analysis, designed to

sanction governmental endorsements of religion.[23]/

However, that use of "accommodation" effectively trivializes the principles of religious neutrality embodied in the Establishment Clause, because virtually any

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[23]/ The United States also proposes that the Meditation-or-Prayer Statute should be upheld because many state legislatures have "judged it appropriate" (Br. of U.S., at 23), and that "[h]ow serious is the need" for accommodation is "a question of public policy for legislatures to assess." Id., at 24.

This is not the first time the Solicitor General has asked the Court to abdicate its role as ultimate caretaker of the freedoms contained in the Bill of Rights in deference to the policy judgments of state legislators. See Br. of the United States submitted in City of Akron v. Akron Center for Reproductive Rights, Nos. 81-746 and 81-1623, at 17-19. The Court rejected the government's suggestion in that case, ___ U.S. ___, ___ (1983) as it should here.

Regardless of how serious is the perceived need, the constitutionality of the state's response is not a question of public policy for the various state legislatures, but an issue of fundamental law for this Court to resolve. Thus, for example, even though many states perceived a strong need as a matter of public policy for vocal, group public school prayer (see, Br. of U. S., at 9), the Supreme Court properly concluded that such programs offended the Establishment Clause. See, School District of Abington Township, supra.; Engel v. Vitale 370 U.S. 421 (1962)

government program advancing, sponsoring or promoting religion can be characterized as merely "facilitating opportunities for voluntary religious exercises." One need only examine the cases in which this Court has found Establishment Clause violations, particularly in the public school setting, to appreciate the extent to which such an expansive definition of "accommodation" would be used to undermine Establishment Clause constraints.

In School District of Abington Township v. Schempp, supra, for example, the school prayer practices in question were, in part, defended as merely providing the opportunity for voluntary religious exercises by those who desired to participate, without coercing those who did not. Id., at 313 (Stewart J., dissenting); see also id., at 287-94 (Brennan J., concurring).[24/] Yet the Court properly recognized that public school

prayer exercises put the government into the business of promoting religion, thus breaching its required neutrality where no "accommodation" of free exercise rights was warranted. See also, Engel v. Vitale, supra., at 445 (Stewart J., dissenting); and Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), aff'd mem., 455 U.S. 913 (1982), where the argument was advanced that the public school prayer program in that case merely promoted religious liberty, and not religion, because it was voluntary and did not prescribe any specific prayer. Id., at 904-905 (Sharp J., dissenting).

Similarly, in Lemon v. Kurtzman, supra, the Court readily acknowledged the value of

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24/ Indeed, in its brief in this case, the United States virtually concedes that its notion of accommodation could include even vocal group prayer. Thus, it asserts that "the practice of opening the school day with spoken prayer" was a way "to accommodate this belief" that prayer "should be an integral part of all of life's activities, including school ...." Br. of U.S., at 9.

sectarian education and the benificent impulses that led the government to attempt its support. Id., at 625. Yet, even though the programs could easily be described as "simply expand[ing] the freedom available to individuals to decide for themselves, whether and how to engage in religious practice without inducing or coercing that choice" (see, Br. of U.S. in this case, at 15), the Court found an Establishment Clause violation because the resulting entanglement could not be constitutionally justified by a purported need to "accommodate" the desire of many parents to provide their children with a religious education. See also, e.g., Wolman v. Walter, 433 U.S. 229 (1977).25/

25/ To the extent that the Court upheld certain financing provisions in Wolman, and other cases beginning with Everson v. Board of Education, 330 U.S. 1 (1946) it did so by concluding that those provisions did not, in fact, constitute government promotion of religion at all. Thus, those cases provide no support for the appellants' argument here that a government program admittedly advancing religion can be constitutionally acceptable as an (footnote continued)

Moreover, just as the doctrine of accommodation does not permit governmental advancement of religion in the absence of a burden to religious free exercise (see e.g., Engel, Lemon, and discussion supra.), accommodation is also distinguishable from those benefits to religion that are the consequence of religiously neutral government functions such as police and fire protection, for example. See e.g., Everson v. Board of Education, supra., at 17. Similarly, references to, and acknowledgments of, religion that are the negligible consequences of promoting some legitimate secular values such as art, patriotic ritual or a communal day of rest, see e.g., Lynch v. Donnelly, ____ U.S. ____, ____ (1984), are permissible because they do not offend Establishment Clause values. Indeed, in

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"accommodation," even when not necessary to alleviate a state-created impediment to religion.

Lynch the Court compared the nativity scene display to art, and it was deemed constitutionally inoffensive, despite the fact that "the display advances religion in a sense," id., at ____, only because its setting and circumstances precluded a finding "of purposeful or surreptitious ... subtle governmental advocacy" of religion. Id.[26/]

Although Everson, Walz and Lynch are troubling, because in a sense each involved direct government support for religion, they

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26/ This Court's decision in Walz v. Tax Commission, 397 U.S. 664 (1976) represents a somewhat more problematic example of the same distinction. The tax exemption policy at issue in Walz was adjudged constitutional because of the complex interplay of historical and factual circumstances which included the findings that (i) the legislative purpose was clearly "not aimed at establishing, sponsoring, or supporting religion" id., at 674; (ii) religious effects and entanglement would have been more severe if churches did not receive a tax exemption, id., and (iii) the benefit to religion was only one of the "incidental effects" of a general government policy of protecting important nonprofit enterprises -- which included, but were not limited to churches -- from the economic pressures of the marketplace, id., at 676.

can be reconciled with the body of this Court's Establishment Clause jurisprudence insofar as they represent outer limits on the involvement of government and religion. In each case the Court concluded -- notwithstanding some strain on Establishment Clause values -- that the government act in question was designed and implemented with essential neutrality as to religion, and thus constitutionally permissible even though religion was certainly benefited to some extent. However, when that benefit to religion becomes the intended design and effect, as opposed to the incidental consequence, of the government act, then the Establishment Clause prohibitions predominate and the government must be restrained unless there is a specific free exercise right in need of accommodation. To eliminate that free exercise "trigger" would transform accommodation into a vehicle for

permitting the government to endorse and advance religion, or to promote particular religious practices such as prayer, and would thus fatally undermine Establishment Clause values.

The principle of accommodation articulated by this Court is designed to assure that government neutrality does not work to discriminate against religion. It would be an ironic corruption of that delicately conceived doctrine if neutrality were abandoned so that religion could become a favored subject of government regulation.

C. THE ALABAMA MEDITATION-OR-PRAYER STATUTE IS DESIGNED TO ADVANCE A RELIGIOUS PRACTICE, DESPITE THE LACK OF ANY IMPEDIMENT TO THE FREE EXERCISE OF THAT RELIGIOUS PRACTICE

In this case, the Alabama Meditation-or-Prayer Statute is not an appropriate accommodation of religion because, first, Alabama public school students do not suffer any significant impediment to their free

exercise right to pray silently. And second, the Meditation-or-Prayer Statute was designed, not to achieve neutrality through accommodation, but rather to endorse religious values and promote the religious practice of prayer.

It is apparently undisputed that, even without the Meditation-or-Prayer Statute, every student always has the right to pray silently whenever the student so chooses (see Br. of U.S., at 22-23). Therefore, the Meditation-or-Prayer Statute is clearly not required to promote any Free Exercise right (which is also conceded by the United States; id. at 10); compare, Sherbert, supra, and Yoder, supra.

Moreover, to the extent that the free exercise right to pray silently needed any protection in Alabama, that goal was already accomplished by the Meditation Statute. Every alleged value of a legislatively

mandated moment of silence (see, Br. of U.S., passim),[27] was already in place before the legislature amended the Meditation Statute in order specifically to endorse "prayer."

Furthermore, the evidence is overwhelming that the Alabama Meditation-or-Prayer Statute was designed and enacted in order to announce the state's endorsement and promotion of religion in the public school, and not to achieve neutrality through the accommodation of religion.

Not only are the defendant Governor's admissions clear, specific and binding,[28]

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[27] Silence certainly has an important place in the classroom, when invoked by the teacher to best suit the educational and introspective needs of the students. However, when the legislature mandates silence, for a specified period and at the same time every day, the alleged benefits cannot survive close analysis (see discussion infra), and in fact suggest the legislature's sectarian purposes.

[28] The admissions contained in the appellant Governor's Answer are detailed supra. (See J.A. 21 and 37.) That Answer was filed by then Governor Fob James. The present Governor, George Wallace, was (footnote continued)

but Alabama's enactment of the Meditation-or-Prayer Statute, notwithstanding the preexisting, and still effective, Meditation Statute, could not be more telling: The only point of the Meditation-or-Prayer Statute was to add, advance and endorse "prayer."[29/]

In addition, although transcripts of the Alabama legislature's consideration of the Meditation-or-Prayer Statute are not

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automatically substituted as a defendant by operation of Rule 25(d), Fed. R. Civ. P., and he is necessarily bound by the admissions of his predecessor.

29/ The statutes differ in two other minor respects as well. First, the Meditation Statute applies only to the first six grades of public school, while the Meditation-or-Prayer statute applies to all grades. Obviously, if the legislature's only goal were to extend the meditation requirement to all grades, that could have been accomplished by simple amendment and without enacting an entirely new statute adding religious references.

Second, the Meditation Statute is mandatory, while the Meditation-or-Prayer Statute is permissive. Once again, this change could have been achieved by simple amendment if that were the legislators' only intent.

available, two other indicators of those proceedings reliably reveal the legislature's exclusively religious purposes: first, the Statement of Senator Holmes which was apparently accepted without dissent and is part of the legislative record (J.A. 50); and, second, the testimony of Senator Holmes to the effect that the statute had a religious purpose, but no secular purpose (J.A. 43-57).

Finally, the conclusion that the Meditation-or-Prayer Statute was designed to advance religion is buttressed by the lack of any factual evidence that it was meant to achieve any other, secular purpose. See, Note, The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools, 96 Harv. L.R. 1874 (1983)(hereinafter "Harv. Note"), at 1881.

Thus, because of that singular religious purpose, in the absence of any burden

to free exercise rights, the statute should be held unconstitutional.[30] The attempt to characterize this statute as an act of religious neutrality, reflecting Alabama's respect for the secular values of silent introspection, is a *post hoc* fabrication

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[30] It is just that religious design of the Meditation-or-Prayer Statute that distinguishes the Alabama program from the New York released-time program upheld in *Zorach* v. *Clausen*, *supra*, which the United States relies on so heavily (Br. of U.S., at 13).

As the *Zorach* Court pointed out, that case was unlike its predecessor, *McCollum* v. *Board of Education*, *supra*, because in *McCollum* "the classrooms were used for religious instruction and the force of the public school was used to promote that instruction." 343 U.S. at 315 (emphasis added). As Justice Brennan later explained, the decisive difference between *McCollum* and *Zorach* was that the *McCollum* program, by "lending to the support of sectarian instruction all the authority of the governmentally operated public school system, brought government and religion into that proximity which the Establishment Clause forbids." *Abington School District* v. *Schempp*, *supra*, at 263 (Brennan J., concurring).

Similarly, here, the authority of the government is used to promote prayer, and that effort is unconstitutional for the same reason. Here, too, the force of government is brought to bear on public school students in the public school classroom to promote religion and prayer.

without any evidentiary support whatsoever. Therefore the Meditation-or-Prayer Statute cannot be justified under the accommodation doctrine.

II

THE COURT OF APPEALS CORRECTLY DECIDED THAT THE ALABAMA MEDITATION-OR-PRAYER STATUTE VIOLATES THE ESTABLISHMENT CLAUSE

The scrupulous separation of church and state is nowhere more important, and has been nowhere more vigorously enforced, than in our nation's public schools. See e.g., Engel v. Vitale, supra; School District of Abington Township v. Schempp, supra; Karen B. v. Treen, supra; and McCollum v. Board of Education, supra. The reasons this Court has applied that strict scrutiny in the public school context -- the impressionability of young children, the compulsory attendance laws that make them a captive audience, the historical impulse to incul-

cate majoritarian religious values, the strong parental interest in religious education and the role of the public schools as exemplars of our democratic ideals -- have been too frequently explained to require elaboration here. See e.g., School District of Abington Township v. Schempp, supra, at 230, et seq. (Brennan J., concurring).

Applying that rigorous scrutiny to the revealing factual record in this case, this Court should hold that the Alabama Meditation-or-Prayer Statute violates the Establishment Clause because of its impermissible purposes and effects.[31] See,

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[31] Amici make no claim of "administrative entanglement." And we do not address "political divisiveness" as a separate indicia of entanglement, Lemon v. Kurtzman, supra, at 622, because of this Court's admonition that it is not an independent measure of unconstitutionality. Lynch, supra, at ___.

However, cases such as this -- the public school church-state controversies, in particular -- demonstrate that "political divisiveness" is an acute element of Establishment Clause concern, and suggest that the Court should reconsider the independent significance of political divisiveness in Establishment Clause jurisprudence.

Harv. Note; Note, Daily Moments of Silence in Public Schools: A Constitutional Analysis, 58 N.Y.U.L.R. 364 (1983) (hereinafter "N.Y.U Note").

A. THE PURPOSE OF THE ALABAMA MEDITATION-OR-PRAYER STATUTE WAS TO ADVANCE, AND EXPRESS ENDORSEMENT OF, RELIGION

It is now well established that a state statute violates the Establishment Clause if (among other things) its predominant purpose is to advance religion. Lemon v. Kurtzman, supra; Stone v. Graham, 449 U.S. 39 (1980). That so-called purpose-test -- which this court recently reaffirmed as a constitutional standard in Lynch v. Donnelly, supra -- was significantly amplified by Justice O'Connor in her concurring opinion in that case: "The proper inquiry under the purpose prong of Lemon, I submit, is whether the government intends to convey a message of endorsement or disapproval of religion." Id., at ___. Justice

O'Connor's analysis is especially important in the context of the public schools, where the captive children are particularly susceptible to the message of religious endorsement conveyed by a teacher (see, N.Y.U. Note, at 379), quite apart from whatever "secular purpose" may be devised in support of that message after it is challenged in court.[32/]

The evidence is overwhelming, and unrefuted, that the Alabama Meditation-or-Prayer Statute was enacted in order to

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32/ In any event, such post hoc rationalizations cannot cure a statute enacted with a constitutionally impermissible purpose. See Lynch v. Donnelly, supra, at ____ (O'Connor concurring)("that [secular purpose] requirement is not satisfied, however, by the mere existence of some secular purpose, however dominated by religious purposes"). See also, e.g., School District of Abington Township v. Schempp, supra, at 223, and Stone v. Graham, supra. Indeed in Stone, this Court held that even the "supposed secular purpose" recited by the legislature itself, in the statute, was not sufficient, id.; whereas in this case, by comparison, the only suggestion of a secular purpose for the Meditation-Or-Prayer Statute comes from the unsworn, self-serving, after-the-fact speculations of counsel.

convey a message of endorsement of religion and promote the religious practice of prayer.[33] (That evidence is described *supra* in considerable detail, and will not be reiterated here.)

Indeed, if the statute is not meant to promote or convey a message endorsing prayer, it would not seem to have any purpose at all. To the extent that silence serves some legitimate, secular, educational function (see, Br. of Gov. Wallace, at 10), teachers and local administrators need no statutory authorization to call for silence in the

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[33] The appellants, and the United States as amicus, misleadingly suggest that because this case involves only a facial challenge to the statute, there are no relevant facts to consider. (Br. of Gov. Wallace, at 3; Br. of U.S., at 5, n.4). However, although the action may be a facial challenge in the sense of not pertaining to the manner in which it was actually applied to these particular plaintiffs, nonetheless the legislative purposes and intended effects of this particular statute were clearly illuminated by a substantial factual record. Alabama's unconstitutional design is amply revealed by the evidence.

classroom. In fact, as we all know, students are regularly asked to remain silent during study-hall periods, reading periods, frequently before beginning and ending the school day, and whenever necessary to quell a disturbance or give the children an opportunity to make the transition between physical and academic activities. What distinguishes the legitimate educational use of silence is that it is not time-specific, but rather varies from class to class, and from day to day according to the needs of the students and depending on any number of variables affecting the activities, mood and rhythm of the classroom.

That the Meditation-or-Prayer Statute requires a minute of silence only at the <u>beginning</u> of the school day actually underscores its religious purpose, and belies the alleged secular benefits urged in

its support. For example, the United States argues that the Meditation-or-Prayer Statute is of value to students who may find it "embarrassing" to pray in the playground, or who may not be able to pray "during the hustle-bustle of lunch." Br. of U.S., at 23. However, the Meditation-or-Prayer Statute does not provide for silence in the playground or at lunch, but only at the beginning of class each day. Thus, the student who needs to pray during lunch, or at play, is not helped at all by the single minute the statute sets aside for prayer many hours earlier.[34/] Indeed the very fact that the Meditation-or-Prayer Statute provides for the moment of silence just as school begins, and following so closely upon

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34/ And if that earlier prayer at the beginning of school is a comfort to the child who feels the need for prayer during the hustle-bustle of lunch, then so would a prayer a few minutes earlier still -- when the child was at home, where there would obviously be no Establishment Clause restraints.

the child's many hours at home when the opportunity for prayer and reflection is so freely available, further demonstrates that the purpose of the statute is not to facilitate the needs of the child, but rather to announce the government's endorsement of religion and its policy of promoting prayer in the public schools.

It is certainly clear that if the Alabama statute had provided only for prayer during the minute of silence its impermissible purpose, and its unconstitutionality, would be beyond dispute. (See, Br. of U. S., at 17, n.16.; and Harv. Note, at 1882.) Alabama's purpose is no less unconstitutional because "prayer" is camouflaged in proximity to "meditation," particularly since "meditation" was already required by statute and the only substantive point of enacting Ala. Code §16-1-20.1 was to emphasize that the government intended to

promote "prayer."

Under all the circumstances of this case, it is not surprising that the district court concluded as a matter of fact -- after hearing the testimony of the legislative sponsor, and assessing that witness' credibility as well as the lack of any contrary evidence -- that the Alabama Meditation-or-Prayer Statute had a religious purpose. 544 F.Supp., at 732. And the Court of Appeals properly relied on that finding in concluding that the statute was unconstitutional. 705 F.2d, at 1535-36.

The purpose-test can maintain its viability as a constitutional standard only to the extent this Court realistically undertakes that examination of purpose, not only with due regard for the government's explanations, but also with sensitivity to the perspective of teachers, school administrators and others who will actually

implement those purposes, as well as the religious minorities in the community who must bear the consequences of even well-intentioned, but overreaching purposes.[35/] In that light, it is clear that Alabama's purposes were religious, that the Meditation-or-Prayer Statute is therefore unconstitutional and that the Court of Appeals decision should be affirmed.

35/ This is particularly so in light of how the Court has chosen to deal with the issue of "political divisiveness." See discussion supra. For example, as Justice O'Connor explained:

> "Political divisiveness is admittedly an evil addressed by the Establishment Clause .... But the constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself." Lynch v. Donnelly, supra, at _____ (concurring opinion; emphasis added).

Thus, unless the court is willing to look at the real "character of the government act," the "evil" of political divisiveness will have become effectively unreviewable and without remedy.

B. THE EFFECT OF THE ALABAMA MEDITATION-OR-PRAYER STATUTE WILL BE TO ADVANCE RELIGION

In addition to prohibiting a statute enacted with a religious purpose, the Establishment Clause prohibits laws whose primary effect is the advancement or inhibition of religion. Lemon v. Kurtzman, supra. Indeed, a statute is just as invalid whether its primary effect is to aid all religions, or only one. Everson v. Board of Education, supra.

Like the purpose-test, discussed infra, the "effects-test" was also reiterated by the Court in its most recent Establishment Clause analysis. Lynch v. Donnelly, supra. However, in his majority decision, the Chief Justice noted that determining whether a government act has the effect of "confer[ing] a substantial and impermissible benefit on religion" is an especially elusive and difficult constitutional judg-

ment. Id., at ____. Once again, Justice O'Connor's concurring opinion in that case suggests a helpful analysis for unraveling that analytical knot by shifting the focus from the effects a government act may have on religion itself, which are necessarily difficult to discern, to "whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval" of religion. Id., at ___ (concurring opinion). That question is far more amenable to judicial inquiry.

Amici contend that even when measured by the conventional standard, the Alabama Meditation-or-Prayer Statute has the primary effect of advancing religion, if only because the preexisting Meditation Statute already satisfied whatever interest the state may have had in the non-religious promotion of introspection -- which, of

course, could have included prayer or any other subject a child wished to consider.[36/]

Moreover, in this case, the statute was clearly, indeed openly, enacted in order to advance religion -- to send the message that religion is back in the Alabama public schools. And it is precisely that explicit religious message that will precipitate inevitable religious effects.

A teacher charged with announcing and

36/ Indeed, the fact that the Meditation Statute is mandatory and the Meditation-or-Prayer Statute is permissive will engender a curious uncertainty about how the minute of silence will be administered in each class, and further suggests the unconstitutional effect of the Meditation-or-Prayer Statute. Every teacher (at least in elementary school) "shall announce a minute of silence for meditation." Ala. Code §16-1-20. Some teachers, however, "may announce" a period of silence for meditation or prayer. Ala. Code §16-1-20.1. Obviously, the differences from class to class will make it plainly evident to the students which teachers emphasize prayer, with consequent coercive effects. Moreover, the very fact that a teacher must choose whether to emphasize prayer, or not, tends to implicate the teacher's religious beliefs and force the teacher to make some judgment of religious preferences for the students.

implementing a moment of silence for meditation or prayer, while at the same time maintaining the posture of neutrality demanded by the Establishment Clause, faces a difficult and unenviable task. The pressures in Alabama to include overt religious practices in the public school classroom are substantial,[37] and in fact many teachers -- such

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[37] One need only consider the factual history involved in this litigation to begin appreciating the magnitude of those pressures:

- the legislature enacted the Governor's School Prayer Statute, Ala. Code §16-1-20.2, notwithstanding the controlling contrary prohibitions of Engel, supra;

- the Jaffree children's teachers conducted vocal, group prayer in their classes, in open defiance of Schempp, supra, and with complete disregard for the Jaffrees' religious convictions and their repeated objections to those prayer practices;

- public school prayer activities are openly conducted throughout Alabama, see e.g. Birmingham Post-Herald, October 16, 1982, without any apparent effort by the state to foster understanding of, and respect for, Establishment Clause restraints;

- after school prayer was enjoined by the district court in this case, the Governor of

(footnote continued)

as the defendant teachers in this case -- may sincerely believe that religion and prayer should be included in the public school curriculum (see, Br. of U.S., at 9). From a teacher's perspective, the differences between the neutral encouragement of introspection, and coercive pressure on a child to pray, may occasionally be subtle indeed. And, of course, more importantly from the child's point of view, coercion is a function not only of the teacher's words, but the manner, emphasis and tone of the teacher's presentation, as

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Alabama urged public school teachers to disobey that court order, dared the courts to do anything about it, and promised state support for any teacher who was subjected to contempt proceedings as a result. Birmingham Post-Herald, September 27, 1982.

Indeed, even the United States acknowledges, and undoubtedly understates, "the apparent hostility of some of Alabama's legislators to this Court's decisions in Schempp and Engel" (Br. of U.S., at 21). And if that hostility is "apparent" to the government's lawyers in Washington, it must be all the more strikingly evident to the people of Alabama.

well. See, Harv. Note, at 1889.

In such trying circumstances, the proper implementation of a period of silence for meditation or prayer cannot possibly be accomplished without the sensitive understanding of the teacher, coupled with the supportive assistance and counsel of school administrators. However, where the admittedly popular desire for public school prayer is fueled by the government's flagrant contempt of the Establishment Clause, and where government officials are promoting religion in the public schools rather than assisting teachers to achieve the appropriate neutrality, then the theoretical secular benefits of the Meditation-or-Prayer Statute -- toleration, pluralism, voluntariness (see Br. of U.S., passim) -- will certainly be overwhelmed by sectarian influences in the classrooms of Alabama.

If the United States were correct (Br.

of U.S., at 9) that a minute of silence is the delicate middle between the prohibitions of the Establishment Clause, and the desire by many for vocal, group prayer in the public schools, then the state would have to help its people understand the need for and delicacy of that middle ground, or destroy it. Alabama's destructive choice is all too regrettably apparent: Rather than facilitating the public appreciation of the constitutional need to accept silence as an alternative to government-sponsored prayer, the government enacted the Meditation-or-Prayer Statute in order to provide for government-sponsored prayer. And the religious sentiments of state leaders that prompted the Meditation-or-Prayer legislation will undoubtedly dictate how it is implemented -- such is the power of the example government sets.

Therefore, even under traditional

"effects-test" analysis, the Alabama Meditation-or-Prayer Statute would have a greater effect in advancing religion than, for example, the nativity scene display considered in Lynch, because in Lynch there was "insufficient evidence to establish that the inclusion of the creche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message." Id., at ____. In Alabama, by contrast, the purposeful religious effort was anything but surreptitious and the governmental advocacy of religion could not be more obvious.

Finally, when the facts of this case are measured against the "effects" standard suggested by Justice O'Connor, the unconstitutionality of the Alabama Meditation-or-Prayer Statute is all the more apparent. Given the history of this one litigation (see discussion supra), not to mention the

broader public context of the church-state controversy in Alabama,[38] it is unquestionably apparent that the Meditation-or-Prayer Statute was specifically intended to, and in fact does "have the effect of communicating a message of government endorsement ... of religion." Lynch, supra, at ___ (concurring opinion). If that standard is to be a meaningful indicator of excessive church-state involvement, then it must be applied with a realistic assessment of the government's message, and a sensitive appreciation of the consequences of that

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[38] Even the appellants recognize the prevalance of "religious factionalism" in Alabama and throughout the country. Appellant Wallace Jurisdictional Statement, No. 83-812, at 26. "Today, the flame of religious zeal is everywhere in evidence in matters that are also political." Id.

The appellants contend that such "factionalism" and "religious zeal" warrant diminishing Establishment Clause restraints, whereas we suggest just the opposite: that such religious zeal virtually assures that a statute such as the Alabama Meditation-or-Prayer Statute will have a religious effect in its implementation and that it will inject that factionalism into the classroom where we, as a people, can least afford its divisive consequences.

communication throughout the community. Measured against that standard, the Alabama Meditation-or-Prayer Statute is surely constitutionally deficient.

CONCLUSION

For all the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

September, 1984

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Nos. 83-812 - 83-929

IN THE

Supreme Court Of The United States

October Term, 1983

George C. Wallace, Governor of the State of Alabama, et al.,
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v.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Brief of Appellees, Ishmael Jaffree, et al.

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ON APPEAL FROM THE UNITED STATES COURT
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Brief of Appellees, Ishmael Jaffree, et al.

STATEMENT OF THE CASE

In 1978, the governor of Alabama signed into law Ala. Code § 16-1-20.[1] This statute required public school teach-

[1]Ala. Code § 16-1-20 provides:

"At the commencement of the first class each day in the first through the sixth grades in all public schools, the teacher in charge of the room in which each such class is held shall announce that a period of silence, not to exceed one minute in duration, shall be observed for meditation."

ers during the first class of each day to enforce a period of silence for "meditation." The act limited its reach to grades one through six in all public schools.

There is no recorded legislative history for § 16-1-20, and the statute doesn't appear to lend governmental support to religion, therefore appellees raise no objection to this statute and it is not currently under challenge. Appellees accordingly acquiesce to the arguments raised in the Brief of the State of Connecticut as Amicus Curiae.

During the 1982 regular session of the Alabama legislature, State Senator Donald G. Holmes was approached by several people and asked "Why don't you introduce a Voluntary Prayer Bill?" (J.A. at 48.). Recognizing that the existing "silent meditation law" was inadequate for voluntary silent prayer, and being committed to the "return of voluntary prayer to our public schools" Senator Holmes introduced Senate Bill 60 (Ala. Code § 16-1-20.1).[2]

Section 16-1-20.1 amended § 16-1-20 in three material aspects; first, it extended its coverage to all grades in all public schools. Next, it gave the teacher discretion on whether to enforce the period of silence. Finally it expressly allowed the teacher to announce that the enforced period of silence may be used for "voluntary prayer".

On May 28, 1982, Appellee, Ishmael Jaffree (Jaffree), on behalf of his three minor children,[3] who were enrolled in three separate public elementary schools in Mobile County, Alabama, filed an action against various county

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[2]Ala. Code § 16-1-20.1 (Cum. Supp. 1982) provides:

> "At the commencement of the first class of each day in all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in."

[3]Mr. Jaffree currently has five pre-teen age children enrolled in the public schools of Mobile County, Alabama.

public school officials alleging state sponsorship of a program of religious exercises. (J.A. at 3-13.).

After learning of Jaffree's lawsuit, the Governor convened a special session of the state legislature and requested that it act on a bill drafted by his son. This bill included a state-composed prayer to be recited at the beginning of any homeroom or class period. The legislature acted, and this bill (Ala. Code § 16-1-20.2) became law.[4] The legislature, during this same special session, also passed another bill (S.B. 61). This bill also required the recitation of prayers in the public schools.[5] The Governor refused to sign the bill and it died.

After passage of Ala. Code § 16-1-20.2, Jaffree amended

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[4]The bill (now Ala. Code § 16-1-20.2 [Cum. Supp. 1982]) provides:

"From henceforth, any teacher or professor in any public educational institution within the state of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may pray, may lead willing students in prayer, or may lead the willing students in th efollowing prayer to God:

Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classroom of our schools in the name of the Lord. Amen."

[5]S.B. 61 provides:

To prescribe a period of time in the public schools, not to exceed 15 minutes, for the study of the formal procedures followed by the United States Congress which study *shall* include the reading verbatim of one of the opening prayers given by either the House or Senate Chaplin at the beginning of the meeting of the United States House or Senate.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which said class is held *shall*, for a period of time not exceeding 15 minutes, instruct the class in the formal procedure followed by the United States Congress. The study *shall* include, but not be limited to, a reading verbatim of one of the opening prayers given by either the House or Senate Chaplain at the beginning of the meeting of the House or Senate. Any student may select an opening House or Senate prayer from the Congressional Record for use by the class.

his complaint to request the court to enjoin and have declared unconstitutional both §§'s 16-1-20.1 and 16-1-20.2 (J.A. at 21-29). Jaffree also moved to have the state temporarily enjoined from enforcing the provisions of these statutes. The court treated this motion as a motion for a preliminary injunction. (R. at .....) Finally, Jaffree motioned the court to consolidate the hearing on the preliminary injunction with the trial on the merits. (R. at). This motion though initially granted was subsequently denied upon objection from the county defendants. (R. at).

On August 2, 1982, the trial judge severed Jaffree's complaint and amended complaint into two separate causes of action, allowed, over objection, seventeen people to intervene as party-defendants, and took testimony concerning the preliminary injunction. (R. at 252-57, 282 and 704).

On August 9, 1982, after two days of testimony, the trial court issued a preliminary injunction prohibiting the enforcement of both Ala. Code §§'s 16-1-20.1 and 16-1-20.2. The trial court found that on its face Ala. Code § 16-1-20.2 had the purpose and effect of advancing religion, and, in light of its legislative history, § 16-1-20.1 did not "reflect a clearly secular purpose". *Jaffree v. James*, 544 F.Supp. 727, 732 (S.D. Ala. 1983).

After the trial in the county case, the court dissolved the injunction and dismissed both actions. The court held that the First Amendment does not limit the state from establishing a religion, and the Fourteenth Amendment was never intended to apply the first eight Amendments to the states. *Jaffree v. Board of School Commissioners of Mobile County*, 554 F.Supp. 1104 (S.D. Ala. 1983); *Jaffree v. James*, 554 F.Supp. 1130 (S.D. Ala. 1983).

Jaffree appealed both actions to the Eleventh Circuit and requested, by motion, a stay and injunction pending

appeal. Upon the denial of the motion, Jaffree requested Justice Powell, as Circuit Justice, to stay the trial court's judgment and reinstate the injunction. Justice Powell granted the stay, reinstated the injunction as to both statutes and issued a brief opinion explaining the reasons for his action:

> Unless and until this Court reconsiders the foregoing decisions, (*Engel v. Vitale*, 370 U.S. 421 [1962], and *School District of Abington Township v. Schempp*, 374 U.S. 203 [1963]) they appear to control this case. *Jaffree v. Board of School Commissioners of Mobile County*, ... U.S. ....., 103 S.Ct. 842, 843 (1983).

The Eleventh Circuit agreed, reversed the district court, and remanded the case for entry of an order enjoining implementation of both statutes. *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983). The State and the intervenors appealed to this court. This Court affirmed the Eleventh Circuit's decision with respect to Ala. Code § 16-1-20.2, but noted probable jurisdiction regarding the constitutionality of Ala. Code § 16-1-20.1. *George C. Wallace, et al. v. Ishmael Jaffree, et al.*, ... U.S. ....., 104 S.Ct. 1704 (1984). (Justice Stevens, though concurring, expressed his understanding that the limited scope of review precluded the issues of (a) whether the Establishment Clause limited the states from establishing a religion, and (b) whether the Fourteenth Amendments made the First Amendment applicable to the states).

SUMMARY OF THE ARGUMENT

Congress Shall Make No Law Respecting An Establishment of Religion, or Prohibiting the Free Exercise Thereof.[6]

The First Amendment is as simple in its language as it is majestic in its purpose. It was intended to establish the immutable principle that this country is committed to the ideal of religious freedom which, concomitantly, includes freedom *from* religion. "This freedom was first in the Bill of Rights because it was first in the forefathers' minds: it was set forth in absolute terms, and its strength is its rigidity". *Everson v. Board of Education,* 330 U.S. 1, 26 (1947).

The framers of the First Amendment meant to make it quite clear that religion was none of the business of government. Government has no right to tell a person; (A) what he may believe about religion; (B) what forms of religious exercises he may practice, or (C) that he must believe in religion at all. The framers were well aware that many of the early settlers had fled to this country from Europe to escape laws which compelled them to support and attend government favored churches. *Everson, supra,* at 8. Many had personally witnessed the civil strife and persecutions generated by established sects. (id. at 9). These persecutions took the form of fines, jailings, tortures, and in many instances, murder. (id.). Men and women of minority faiths were persecuted because they insisted in worshiping God as their conscience dictated (id. at 10). Public indignation over the civil strife and the persecution of religious minorities "found expression in the First Amendment". (id. at 11).

In enacting Ala. Code § 16-1-20.1, which authorized pub-

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[6]U.S. Const. Amend. 1. The fourteenth amendment made this prohibition applicable to the states with equal force. *Cantwell v. Connecticut,* 310 U.S. 296 (1970); *Everson v. Board of Education,* 330 U.S. 1 (1947).

lic school teachers to enforce a period of silence for group prayer, the Alabama legislature made a "law respecting an establishment of religion" or "tend (ing) to do so".[7] The fact that the statute also permits meditation is of no consequence. "The use of 'or' in a moment of silence statute serves only to make prayer voluntary, and the fact that participation in prayer is voluntary cannot serve to free it from the limitations of the Establishment Clause. Thus, if a moment of silence for prayer is unconstitutional, so is 'a moment of silence for prayer or meditation, or for prayer or meditation or daydreaming".[8] Further, "(i)t cannot be seriously argued and certainly cannot be assumed that school children can discern the ice distinctions concerning the meanings of 'meditation', . . . and 'prayer'. *Duffy v. Las Cruces Pub. Schools*, 557 F.Supp. 1013, 1016 (D.N. Mex. 1983).

> That a child is offered an alternative may reduce the constraint, it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non conformity is not an outstanding characteristic of children.
>
> *McCollum v. Board of Education*, 333 U.S. 203, 227 (1948) (Frankfurter, J. concurring).

This Court has recently reaffirmed the utility of resorting to the tri-part test fashioned in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971) to determine whether a challenged law or act contravenes the prohibition of the Estab-

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[7]The Chief Justice has recently suggested that any official conduct which tends to establish a religion or religious faith, fails to pass muster under the establishment clause. See *Lynch v. Donnelly* _____ U.S. _____, 104 S.Ct. 1355, 1361 (1984).

[8]See Note, The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools, 96 Harv. L. Rev. 1874, 1882 (1983).

lishment Clause.[9] The *Lemon* test requires the state to demonstrate; first, that the statute has a secular purpose; second, that its principal or primary effect be one that neither advances nor inhibits religion; and third, that the statute does not foster an excessive governmental entanglement with religion. *Lemon, supra,* at 612-613. Further, if a statute fails to meet any of these standards then it *must* fail to meet the first amendments prohibitions. *Stone v. Graham,* 449 U.S. 39, 40-41 (1980).

In applying the *Lemon* test to Ala. Code § 16-1-20.1 the trial court found that the statute did not "reflect a clearly secular purpose". *James, supra,* at 732. The court further found that "the enactment of . . . § 16-1-20.1 (was) an effort on the part of the State of Alabama to encourage a religious activity" in the public schools. (id.).

The breach of the impregnable "wall" warned of by *Everson's, supra,* dissenters confronts this Court. The modern court has referred to the "wall of separation" as a useful figure of speech—a metaphor if you will. *Lynch v. Donnelly,* ..... U.S. ....., 104 S.Ct. 1344, 1359 (1983). The Court has also viewed it as "far from being a 'wall', it is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship". *Lemon, supra,* at 614. (requoted in *Lynch, supra* at 1362). Seizing upon this and other loose language in some of the Court's opinions, the State advances the theory that it can sponsor group prayer exercises to "accommodate" the needs of those students who wish to pray.[10] The Solicitor General, like-

[9]The Chief Justice, speaking for the majority in *Lynch v. Donnelly, supra,* at 1362 found it useful to employ the test in the line-drawing process, but emphasized the unwillingness of the Court to "be confined to any single test or criterion in this sensitive area". However, Justice Brennan, in dissenting, noted that the Court in *Committee for Public Education v. Nyquist,* 413 U.S. 756, 772-773 viewed the *Lemon* test as mandatory. Id at 1371, N.2.

[10](App. Br. at 37-38). See also, Intervenors' Br. 10-13.

wise, argues that Alabama's silent prayer statute should be viewed as a constitutional means of "accommodating the religious and meditative needs of students".[11]

The government's "accommodation" argument falls from its own weight. There was not one scintilla of evidence offered during the hearing on the preliminary injunction, that the legislators' enacted § 16-1-20.1 for the purpose of accommodating the religious needs of the students. The statute is written in the permissive, therefore, no public teacher is required to "accommodate" the spiritual needs of the students. Further, silent prayer is a natural inalienable right incapable of being surrendered or transferred and therefore is not burdened by state action. Absent the state's enforced one minute of silence, the students have complete freedom to offer a personal private prayer during any of the other 23 hours and 59 minutes of the day—without any religious persecutor being the wiser.

With great difficulty the state attempts to argue that this case creates tension between the Establishment and Free Exercise Clauses. (App. Br. at 6, 7, 16, 30-33). The Solicitor knows better. "(I)t is unlikely that in most contexts a strong Free Exercise claim could be made that time for personal prayer must be set aside during the school day". (S.G. Br. at 10). A public school is obligated to provide religious facilities only if its failure to do so would effectively foreclose a person's practice of his religion.[12]

The fatal flaw in the State's argument is that here, the State is attempting to *promote* or facilitate a religious exercise (i.e.; group prayer). The Free Exercise Clause, on the other hand, prevents the state from making any law or taking any act which *prohibits* religious exercises.

> [W]hile the Free Exercise Clause clearly prohibits the

[11] (S.G. Br. at 11).

[12] L. Tribe, Constitutional Law § 14-8 (1978).

> use of state action to deny the right of free exercise to anyone, it has never meant that a majority could use the machinery of the state to practice its beliefs.
>
> *Abington School District v. Schempp*, 374 U.S. 203, 226 (1963).

The first amendment prohibits the state from transforming an individual's right to silently pray, at any time, into a formal act of group worship in a tax supported public institution attended by individuals of all faiths and beliefs, including non-believers. For the state to demand the right to enter these diversely populated institutions in order to exercise our religious freedom is not freedom at all, but a perversion of freedom, bordering on religious fanatacism and despotism.

ARGUMENT

I. Alabama's Statute Which Authorizes Public School Teachers to Prescribe Daily Periods of Enforced Silence for Group Meditation or Group Prayer Violates the Establishment Clause.

A. *Unless Or Until This Court Reverses Its Holdings In* Engel, Schempp, *And Stone, They Appear To Control The Prayer Exercises At Issue Here.*

In 1978, the Alabama legislature passed an act which required public school teachers in grades one through five to enforce a moment of silence for meditation.[13] Ostensively, students may use this moment to doze, daydream, "think about yesterday's football game or tonight's date" or even to pray,[14] and "no one will be the wiser". This statute cre-

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[13]This act (§ 16-1-20) is set out in full on page 1 infra.

[14]Meditation has been defined as "a term . . . referring to protracted concentration of thought on supernatural dights of the divine world, and of the spiritual world in general." Encyclopedia Judaisa 1218 (1971).

ated no controversy nor was it the subject of any suit at law. It is not now.

In 1982, in order to breathe religious life into its silent meditation statute, the Alabama legislature amended § 16-1-20 to expressly include "prayer" as the preferred activity in which the students and teachers may engage during the reverent moment of silence.[15] This amendment extended its largess to "all grades in all public schools". Section 16-1-20 was not expressly repealed and is still "good law" in Alabama.[16] With the enactment of § 16-1-20.1 the State of Alabama put its official seal of approval on state sponsored organized group prayer in its public schools. Whether verbal or silent, "prayer is perhaps the quintessential religious practice for many of the world's faiths, and it plays a significant role in the devotional lives of most religious people". *Karen B. v. Treen,* 653 F.2d 897, 901 (5th Cir. 1981) aff'd 445 U.S. 913.

In a long and impressive line of cases beginning with *Everson v. Board of Education, supra,* and culminating with *Stone v. Graham,* 449 U.S. 39 (1980), this Court has uniformally held that nowhere is it more important than in our public schools that we keep the "wall of separation" between church and state high and impregnable.

Though a slim majority in *Everson, supra,* upheld, against a constitutional attach, a New Jersey statute which permitted school officials to reimburse Catholic parochial school parents for the transportation expenses of their children, the court unequivocally stated that the Establishment Clause must be given a "broad interpretation in light of its

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[15]Ala. Code § 16-1-20.1. The full text of this statute is set out on page 1 infra.

[16]Because Ala. Code § 16-1-20.1 did not expressly repeal § 16-1-20 and in view that the former is permissive while the latter is mandatory, it is unclear whether some public schools teachers have an option of preceeding under one or the other.

history and the evils it was designed forever to suppress". (id. at 14-15).

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, *aid all religions*, or prefer one religion over another. Neither can force nor *influence* a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in *any* religion.
>
> . . . . In the words of Jefferson, the clause was intended to erect a wall of separation between Church and State. (citations omitted) (emphasis added).
>
> (id. at 15, 16).

Justice Jackson, in dissent, noted:

> Our public school . . . is a relatively recent development dating from about 1840. It is organized on the premise that secular education can be isolated from all religious teachings so that the school can inculate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion.
>
> (id. at 23-24).

Justice Rutledge explained that prohibiting religious training, teaching and observances in public schools does not demonstrate hostility toward religion.

> . . . . It does not deny the value or the necessity for religious training, teaching or observances. Rather, it secures their free exercise. But to that end it does deny that the state can undertake or sustain them in any form or degree. For this reason the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the twofold protection and, as the state cannot forbid, *neither can it perform*

> *or aid in performing the religious function.* The dual prohibition makes that function altogether private. It cannot be made a public one by legislative act. (emphasis added).
>
> (id. at 52. Rutledge, J. dissenting).

In *McCollum v. Board of Education*, 333 U.S. 203 (1948) this Court was called upon for the first time, to decide whether the Establishment Clause prevented the state from inviting religious instructors, employed by religious groups, into the public classrooms on a weekly basis to provide religious instruction. In finding this practice unconstitutional this Court stated:

> To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings.
>
> (id. at 211).

Justice Frankfurter admonished, in his concurring opinion:

> Zealous watchfulness against fusion of secular and religious activities by Government itself, through any of its instruments but *especially through its educational agencies*, was the democratic response of the American community to the particular needs of a young and growing nation, unique in the composition of its people. (emphasis added).
>
> (id. at 215).

On the role of the public school in American society, Justice Frankfurter added:

> Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects.
>
> (id. at 216-217).

Though this Court in *Zorach v. Clauson*, 343 U.S. 306 (1952) upheld against a constitutional challenge New York's release program, it did not retreat one inch from its long held position that between church and state the "separation must be complete and unequivocal". (id. at 312). This case was distinguished from *McCollum, supra,* because the program of religious instruction took place off school premises and involved no on-going contact with public school officials. The court noted the narrowness of its holdings:

> Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or *some religion* on any person. . . .
>
> It may not make a religious observance compulsory. . . . *But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here.* (emphasis added)
>
> (id. at 314).

In the first of two landmark decisions, this Court was faced, for the first time, with the question of whether the state could sponsor, as part of its program of public education, voluntary, non-coercive prayers. In *Engel v. Vitale*, 370 U.S. 421 (1962) the New York Board of Regents promulgated a prayer for teachers and children to recite in its public school classrooms. Participation was voluntary in that children were excused from the room if they did not wish to recite the prayer. This Court, in finding this "program of prayer" activity unconstitutional, held:

> (T)he fact that the program, as modified and approved by state courts, does not require all pupils to recite the prayer but permits those who wish to do so to remain silent or be excused from the room, ignores

> the essential nature of the program's constitutional defects. Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause.
>
> (id. at 430).

The Court added:

> The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permits its 'unhollowed perversion' by a civil magistrate.
>
> (id. at 431-432)

The Court, in conclusion, noted:

> It is neither sacrilegious nor anti-religious to say that each separate government in this country should stay out of the business of writing *or sanctioning* official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.
>
> (id. at 435) (emphasis added).

In the second of the landmark cases, *Abington School District v. Schempp*, 374 U.S. 203 (1963), this Court was again faced with the question of the permissible range of governmental excursion into the affairs of religion. At issue in *Schempp, supra,* was whether the government could require the reading of certain scriptures from the Holy Bible, without comment, at the opening of the school day with provision being made to excuse any non-consenting child. Also at issue was the state's practice of requiring daily recitation of the Lord's Prayer.

After reviewing the history of the Court's Establishment Clause cases, Justice Clark, speaking for the majority, laid to rest petitioner's argument that to deny the majority the

use of the public school classrooms is to deny them their free exercise rights.

> Finally, we cannot accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those affected, collides with the majority's right to free exercise of religion. While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs.
>
> (id. at 225-226).

Finally, we come to this Court's most recent pronouncement concerning state sponsored religious activities in public schools, *Stone v. Graham, supra.* As in the present case, *Stone* involved a statute permitting a passive advancement of religion. *Stone* involved a Kentucky statute which required the posting of the Ten Commandments on the wall of each public classroom. The statute also articulated a secular purpose. This Court's Per Curiam opinion, employing the three part standard articulated in *Lemon v. Kurtzman, supra,* had no trouble in finding the statute unconstitutional. In response to the argument that the statute requires "passive" observance of the decalogue, the court observed:

> It does not matter that the posted copies of the Ten Commandments are financed by voluntary private contributions, for the *mere posting of the copies under the auspices of the legislature provides the 'official support of the State . . . Government* that the Establishment Clause prohibits. (citation omitted). Nor is it significant that the Bible verses involved in this case are merely posted on the wall, rather than read aloud as in *Schempp* and *Engel,* for 'it is no defense' to urge that the religious practices here may be relatively minor encroachments on the First Amendment.
>
> (id. at 42).

B. *Alabama's Silent Prayer Statute Must Be Judged By the Three Part Standard Fashioned in* Lemon v. Kurtzman.

The State of Alabama has passed a law authorizing a silent prayer period in its public schools. Because silent prayer appears so innocent there is a tendency to view the state's action as innocuous at best and de minimis at worst. Lest we get lulled into a state of complacency we are best to remember that "prayer is serious business—serious theological business." *Marsh v. Chambers*, ... U.S. ....., 103 S.Ct. 3330, 3379 (Brennan J. dissenting). The states are not free to make public business the business of religious worship. *Everson, supra* at 26 (Jackson J. dissenting). "By reason of the First Amendment, government is commanded to have no interest in theology or ritual . . . . for on these matters government must be neutral." *Engel, supra* at 443 (Douglas J. concurring).

Section 16-1-20.1, which encourages collective classroom prayer, was an obvious and transparent effort on the part of the state to restore organized religious activity to the public school. The district court, after two days of testimony, reached this result. *James, supra,* at 731. Unless this Court is now prepared to abandon its three part *Lemon* test,[17] the challenged statute clearly fails to pass muster under the Establishment Clause. This test requires the challenged statute to: (a) have a secular purpose; (b) have a

[17]Both the district court and the court of appeals applied the *Lemon* test to the challenged statute. Should this Court develop a new legal standard solely for this case, then the injustice warned of by Justice Rehnquist will be apparent:

> If this case is to be judged by a standard not employed by the court below and if the new standard involves factual issues or even mixed questions of law and fact, that have not been addressed by the District Court, the Court should not itself purport to make these factual determinations.
>
> *Larson v. Valente*, _____ US.S _____ 102 S.Ct. 1673, 1691 (Rehnquist J. dissenting).

principal or primary effect which neither advances nor inhibits religion, and (c) avoid an excessive government entanglement with religion. *Jaffree v. Wallace,* 766 F.2d 1526 (11th Cir. 1983). The State has failed to carry its burden with respect to any of the three standards.

C. *Alabama's Silent Prayer Statute Was Enacted For the Express Purpose of Advancing Collective Prayer In the Public Schools.*

During the hearing on the preliminary injunction the state failed to offer any evidence of a secular purpose for § 16-1020.1. The only evidence offered concerning legislative purpose was the testimony of Senator Donald S. Holmes. Senator Holmes admitted to having a religious purpose only, in sponsoring § 16-1-20.1.

> Q Whether you had any other purpose other than, as you stated, to return voluntary prayer to public schools, did you have any other purpose in sponsoring this particular legislation?
>
> A No, I did not have no other purpose in mind.
>
> (J.A. at 52).

The State failed to offer evidence on "secular purpose" because none existed. This is evident when you consider that the trial court initially granted Jaffree's motion to consolidate the trial on the merits with the hearing on the preliminary injunction.[18] This action by the court put the State on notice that it should prepare its case. We must assume that the State appeared at the hearing prepared to argue its case. Yet the State offered no evidence of a secular purpose. There is no evidence that any other legislator, other than Senator Holmes, discussed § 16-1-20.1. We can surmise that the legislature, with a "nod and a wink"

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[18]See discuss at 2 infra.

passed the bill without resort to an extended debate as to its purpose.

The State does not deny that it had a religious purpose in enacting § 16-1-20.1. The State instead relies on Justice Brennan's concurrence in *Schempp, supra,* in which he suggest that "the observance of a moment of reverent silence in the class" may satisfy the strictures of the Establishment Clause. (id. at 281). The State reads too much in Justice Brennan's statement. Justice Brennan was not speaking for the Court, and no other justice joined in his opinion. The Court was not presented with the question of the constitutionality of a statute prescribing a moment of silence for prayer. In fact, no such statute existed in 1963 when *Schempp* was decided. Justice Brennan was speaking hypothetically without the benefit of seeing a silent meditation statute in print or in operation. Finally, the Court had not yet formulated the three part *Lemon, supra* test employed by it in subsequent decisions.

The State suggest that the purpose part of the *Lemon* test should be modified so that a statute is only deemed unconstitutional if its purpose is "solely religious" and if it is likely to impar religious freedom by coercing, compromising, or influencing religious beliefs. (App. Br. at 16). This suggested modification found some support in this Court's recent decision in *Lynch v. Donnelly, supra.* The Chief Justice, speaking for apparently a plurality, observed that the Court has in the past, invalidated legislative action, but only when the Court concluded that the statute or activity was motivated "wholly by religious considerations". (id. at 1362). However, it is doubtful that this is the position of the full court.

Justice O'Connor concurring in *Lynch, supra,* found the purpose prong of the *Lemon* test to be broader than that outlined by the Chief Justice:

> The purpose prong of the *Lemon* test requires that a government activity have a secular purpose. That requirement *is not* satisfied, however, by the mere existence of some secular purpose, however dominated by religious purposes . . .
>
> The proper inquiry under the purpose prong of *Lemon*, I submit, is whether the Government intends to convey a message of endorsement or disapproval of religion (emphasis added)
>
> (O'Connor, J. concurring at 1368)

Also supporting this broader interpretation of the "purpose" prong was Justice Brennan. Justice Brennan, whose opinion was joined by Justices Marshall, Blackmun and Stevens, reasoned that the test was first developed to express the essential concerns animating the Establishment Clause. Thus, the test is designed to insure that the organs of government remain strictly separate and apart from religious affairs. Justice Brennan reminded the Court that it should always be alert in its examination of any challenged statute or practice "not only for an official establishment of religion, but also for those other evils at which the Clause was aimed—'sponsorship, financial support, and active involvement of the sovereign in religious activity'. (citation omitted) (id. at 1372). In light of these concerns, Justice Brennan reasoned that any challenged statute or act must reflect a "clearly secular purpose" (id).

The Intervenors, similarly, do not mention a secular purpose in the enactment of § 16-1-20.1. They instead suggest that in this case the Court should do away with its three part test and use the historical test fashioned in *Marsh v. Chambers*, ... U.S. ....., 103 S.Ct. 3330 (1983).

The historical test is not applicable to this case for two principle reasons. First, there is no history of long duration concerning statutes which require or permit moments of

silence for prayer in the public schools. Prior to 1978 no silent meditation statutes existed.[19] Secondly, even if there was a history associated with organized silent prayer in the public schools, Justice Brennan, in his eloquent concurrence in *Schempp, supra,* explained why that history can no longer govern this case.[20]

The most attractive argument raised concerning legislative purpose is that of the Solicitor General. The Solicitor argues that notwithstanding the fact that some legislators may have had a religious purpose in enacting § 16-1-20.1, if their means of accomplishing this purpose were within the permissible bounds of "accommodation", then the statute should be constitutional. (S.G. Br. at 13, Dec. 1983). The Solicitor further argues that "the whole point of religious accommodations is to create opportunities for persons to pursue their own beliefs and thus to provide an environment in which "voluntary religious exercise may flourish". (citations omitted) (id.). After admitting that no Free Exercise claim can be raised under the circumstances of this case, the Solicitor then proceeds to say that Alabama's silent prayer statute is merely an attempt on the part of the state "to facilitate the free exercise of religion". (S.G. Br. at 19, July, 1984). The Solicitor, therefore, rationalized that § 16-1-20.1 was merely an "accommodation" of the free exercise rights of students.

The Solicitor fails to recognize three important problems with this analysis applicable only to the facts of this case. First, nothing in § 16-1-20.1, with respect to accommodating individual's religious needs, is not accomplished by its prececessor, § 16-1-20. Next, if the State had in mind "accommodating", on a non-discriminatory basis, individual students' religious needs it would not have worded the

---

[19]See S.G. Br. at 6. n. 5.

[20]See Abington v. Schempp, supra at 267-278. (Brennan J. concurring).

statute is permissive. Finally, the silent prayer needs of students need not, and, in fact, cannot be accommodated by any acts of the state.

The Solicitor's post hoc rationalizations notwithstanding, it was the intent of the Alabama legislature to sponsor organized group prayer as a daily fixture in the public schools. They were well aware that any child could silently pray under the existing statute.[21] Further, § 16-1-20.1 was not intended as a mere acknowledgement by the state of the role that religion has played in American life. *Lynch, supra* at 1360. Nor was its purpose to "accommodate all faiths and all forms of religious expression, and show hostility towards none. (id. at 1361). As will be discussed below, "(i)n this immigrant nation of dreamers and dissidents . . . no broad consensus regarding the spiritual side of the human condition exists". *Brandon v. Board of Ed. of Guilderland Cent. Sch.*, 635 F.2d 971, 973 (2nd Cir. 1980), *cert. denied* 454 U.S. 1123.

Prior to the enactment of § 16-1-20.1 there existed a statute which prescribed a period of silence for meditation. A group of citizens requested the sponsor of § 16-1-20.1 to introduce "a voluntary prayer bill" in the Senate.[22] As a result of this constituent pressure, Senator Holmes introduced an amendment to the silent meditation statute to include "prayer". No evidence of secular purpose was advanced at trial. On this record § 16-1-20.1 cannot be said to reflect a "clearly secular purpose." *Committee for Public Education v. Nyquist*, 413 U.S. 756, 773 (1973).

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[21] See generally (J.A., at 47-52).

[22] (*Id.*, at 48).

D. *Alabama Silent Prayer Statute Has the Principal and Primary Effect of Advancing the Religious Practice of Collective Prayer In the Public Schools.*

Alabama's silent prayer statute's failure to satisfy "the purpose" prong of the *Lemon* test renders it unconstitutional. *Stone v. Graham, supra, Lynch v. Donnelly, supra,* at 1362. In addition to having a "wholly" religious purpose, the statute also has a principle and primary effect of advancing religion. In *Larkin v. Grendel's Den, Inc.,* ___ U.S. ___, 103 S.Ct. 505 (1982), this Court, with Chief Justice Burger speaking for the majority, recognized the potential for political conflict when governmental action gives even the "appearance" of governmental support for religion:

> . . . The mere *appearance* of a joint exercise of legislative authority by church and state provides a significant *symbolic* benefit to religion in the minds of some by reason of the power conferred. It does not strain our prior holdings to say that the statute can be seen as having a "primary" and "principle" effect of advancing religion (emphasis added).
>
> (*Id.*, at 51)

Justice O'Conner concurring in *Lynch, supra,* echoed these same sentiments:

> What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that makes religion relevant, in reality or public perception, to status in the political community. *Lynch v. Donnelly, supra,* at 1368-1369. (O'Connor, J. concurring).

Justice O'Connor added these constructive comments:

> Every government practice must be judged in its

> *unique circumstances* to determine whether it constitutes an endorsement or disapproval of religion. In making that determination, the courts must keep in mind both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded. Government practices that purport to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny.
>
> (Id., at 1369-1370).

When governmental action is directed, as here, to young and impressionable children, it becomes even more important to closely scrutinize the "symbolic" effect of that action. Because of the coercive environment of public school classrooms, a stricter separation of religion is needed in the primary and secondary schools than other government institutions.[23] The Solicitor candidly admits that "the special character of the public school classroom justifiably makes us especially sensitive to possible Establishment Clause problems in that setting". (S.G. Br., at 28).

In finding a similar silent prayer statute unconstitutional, court in *Duffy v. Las Cruzes Pub. Schools*, 557 F.Supp. 13 (N.D. Mex. 1983) warned:

> The dangers inherent in the sovereign placing its imprimatur on a religious exercise are particularly acute where children are involved. As established by Gordon Cawearti, an expert in the fields of curriculum and discipline, children are extremely impressionable

---

[23]*See Widmar v. Vincent*, _____ U.S. _____, 102 S.Ct. 269 where . . . this Court draws a distinction between university students (young adults) and younger students where the former is less impressionable and able to appreciate the University's policy of religious neutrality. *See also Marsh v. Chambers*, _____ U.S. _____, 103 S.Ct. 330, 335, 336 (1983) where the Chief Justice drew a distinction between adult legislators presumably not readily susceptible to religious indoctrinations, and children, who are subject to "peer pressure".

> and easily influenced. They exhibit a tendency to conform with each other in dress and behavior and it is psychologically disturbing for a child to be different from his peers. It is a clear and present danger that the children will perceive a moment of silence as government approval of religion.
>
> (Id., at 1016).

In finding a policy which permitted equal access to public school facilities unconstitutional, the court in *Brandon v. Guilderland Bd. of Education*, 635 F.2d 971, 978 (2nd Cir. 1980) *cert denied*, 454 U.S. 1123 (1981) made the following observation:

> Our nation's elementary and secondary schools play a unique roll in transmitting basic and fundamental values to our youths. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed.

There are a number of factors which give Alabama's silent prayer law the "appearance" of sponsoring religion. The statute prescribes that the meditation or prayer period is to be observed at the "commencement of the first class". This time period is the usual period reserved for school prayer. The length of time allotted is one minute. One minute is approximately the time it would take to recite the Lord's Prayer. The teacher is given the discretion to announce that meditation or prayer may be observed during the silent period. The state's compulsory education machinery is used to provide the audience. Finally, the audience is composed of young impressionable children.

A teacher represents the established order in a classroom and commands respect not unlike that of a judge or mayor.[24] If a student perceives that the teacher intends her period of silence to be used for prayer, then the primary

[24]See R. Dawson, Political Socialization, 49-50 (2d Ed. 1977).

affect will be to advance religion. The "law of intimidation operates, a non-conformity is not an outstanding characteristic of children". *McCollum v. Board of Education*, 333 U.S. 203, 227 (1948).

As in *Duffy, supra*, the state here has chosen to sponsor and actively involve itself in the matter of prayer. "A prayer, however, is undeniably religious and has, by its nature, both a religious purpose and effect (citation omitted). By authorizing a time for prayer in the classroom, the (appellants) have placed the imprimatur of the State on that religious activity". (Id., at 1201).

E. *Alabama Silent Prayer Fosters An Excessive Entanglement of the State Into the Affairs of Religion.*

This Court has acknowledged two distinct types of entaglements; administrative and political divisiveness. *Lemon v. Kurtzman, supra*, at 615-20, 623. The former involves government officials coming into close ongoing contact with the affairs of religious institutions. Id., at 623. It is the potential for political divisiveness generated by Alabama's silent prayer statute which causes the state to become excessively entangled with the affairs of religion.

This Court recognized in *McCollum v. Board of Education*, 333 U.S. 203, 231 that "(t)he public school is at once the symbol of our democracy and the most persuasive means for promoting our common destiny. In no other activity of the state is it more vital to keep out divisive forces than in its schools". The potential for political divisiveness is inherent in Alabama's silent prayer program. "(I)t is impossible for the state to promote 'all' religions. Any activity necessarily has greater benefit to religions most suited to make use of it. As a result, not only the nonreligious, but also minority religions suffer because of

their inability to enjoy the benefits of the state's religious programs.[25]

F. *Neither the Free Exercise Clause Nor the Accommodation Doctrine Justify Alabama's Intrusion Into the Affairs of Religion By Prescribing Silent Prayer Periods.*

All the proponents, to a greater or lesser degree, argue that even if the Free Exercise Clause doesn't require the state to organize group prayer periods in the public schools, it permits the state to "accommodate" religious groups in this manner. Such promotion of free exercise is "advancing religion in violation of the Establishment Clause. *Nyquist, supra*, at 788-789.[26] Though the Free Exercise Clause "prohibits" the state from denying the right of *anyone* to practice his beliefs, "it has never meant that the majority could use the machinery of the state to practice its beliefs". *Schempp, supra*, at 226.

> It is now firmly established that a law may be one 'respecting an establishment of religion' even though its consequence is not to promote a 'state religion' and even though it does not aid one religion more than another, but merely benefits all religions alike. *Committee for Public Education v. Nyquist, supra*, at 771.

The Free Exercise Clause does not require setting aside a specific time for silent prayers during the school day. *Duffy, supra*, at 1020. Some are of the opinion that God will hear only those prayers that are performed in a ritual-

---

[25]Seic. Daily Monuments of Silence in Public Schools: A Constitutional Analysis, 58 NYUL Rev. 364, 374-75 (1983). In Note 55 Seide cites examples of groups that would not benefit from the state's silent prayer program which includes Taoist, who do not believe in a theistic God, and Moslems, who express their faith in a manner not suited by a one minute of silence.

[26]See also, *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961), *Everson, supra*, at 15; and *Karen B. v. Treen*, 653, F.2d 897, 901 (5th Cir. 1981), *aff'd mem.* 455 U.S. 913 (1982).

istic fashion, at certain times, in certain places, and in a prescribed manner. It is precisely because prayer is "serious theological business" that the public school classrooms are ill suited for its purpose. The public school was not intended to foster spiritual growth. Prayer, to the believer, is the highest form of worship—a religious activity capable of developing a spiritual relationship with their God.

Appellants err when they suggest that the statute is neutral between religion and non-religion. To remain neutral the government must not "confer any imprimatur of state approval on any religious sects or practices". *Widmar v. Vincent*, 454 U.S. 263, 274 (1981). The state is not being unneutral to withhold that which the constitution forbids. Nor does the absence of coercion save the statute from the limitations of the Establishment Clause. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion. *Engel, supra*, at 430-431.

> Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.
>
> *Schempp, supra*, at 223.

The Solicitor premises his entire frontal assault on *Zorach v. Clauson*, 343 U.S. 360 (1952). By analogy, the Solicitor argues that the "accommodation" principal established in *Zorach* applies with equal force to the case at bar. *Zorach* offers the government no support. The Court in *Zorach* carefully confined its ruling to the facts of the case.

Zorach involved a New York sponsored program where students were released from the public school buildings and

grounds so that they may go to religious centers for religious instruction or devotional exercises. The Court's holding can be capsuled in the following two paragraphs:

> But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here.
>
> (id., at 684).
>
> Here . . . the public schools do no more than accommodate their schedule to a program of outside religious instruction. (id.).

Though the Court did not expressly state that the "accommodation" principle was required by the Free Exercise Clause, it is apparent that such concerns were at the surface of their decision. The Court recognized that the failure to allow off premises release time would burden the Free Exercise rights of the students. The Solicitor has previously acknowledged that there must be come state created burden on religious observance or exercise before the "accommodation" principle comes into play:

> All religious accommodations advance religion in the sense that their effect is to relieve the burden on religious observance that facially neutral rules or practices would otherwise impose.
>
> Br. for the United States as Amicus Curiae in *Estate of Thornton v. Caldor, Inc.*, at 27, cert. granted, (Mar. 5, 1984) No. 83-1158.

The zone of permissible state accommodation is not absolute. The zone extends from a point delineated on one side by *Wisconsin v. Yoder*, 400 U.S. 205 (1972), where the state interest are insufficient to justify the burden of religion, to a point on the other side delineated by *Lemon v. Kurtzman, supra*, where the state accommodated religion to the point of establishment.

II. Alabama Silent Prayer Statute Discriminates Against Some Religions Which Because of Their Liturgy Cannot Enjoy the Benefits of the State's Religious Program.

Though neither of the lower courts so ruled, Alabama silent prayer statute discriminates among sects. The one minute duration of the exercise is closely tailored to only those religions which can satisfy their prayer requirements within this period of time. Several of the world's faith can not exercise their prayer practices within this limitation. The followers of Islam must pray five times a day and bow their heads to Mecca.[27] Further, Muslims must say their prayer while kneeling with their foreheads touching the ground.[28] The International Society of Krishna Consciousness requires the reptitive verbal chanting of the following words continuously:

> Hare Hore Hare Rama
> Hare Rama Rama Rama
> Rama Rama Hare Hare
> Hare Krishna, Hore Krishna,
> Krishna, Krishna.

Alabama's one minute silent prayer statute would not satisfy the prayer needs of Krishna Consciousness followers.[29]

Further, there are some devout Christians to whom any public group prayer is offensive to their religion. To them the words in the gospel Matthew mean what they say:

> And when thou prayest, thou shalt not be as the hypocrites are: for they love to pray standing in the synagogues and in the corners of the streets, that they may be seen of men. Verily I say unto you, They have their reward.

---

[27] Larson, Larson's Book of Cults, at 103 (1982).
[28] (*Id.*, at 107).
[29] (*Id.*, at 289).

> But thou, when thou prayest, enter into thy closets, and when thou has shut thy door, pray to thy Father which is in secret; and thy Father which seeth in secret shall reward thee openly. Mat. 6:5-6.

Finally, there are some religions that do not believe in God and do not have prayer as part of their liturgy.[30] Alabama's silent prayer statute therefore discriminates among religions. For Alabama's silent prayer statute to survive a constitutional challenge, the State must demonstrate a compelling governmental interest and show that the statute is closely fitted to further that interest. *Larson v. Valante*, ... U.S. ....., 102 S.Ct. 1673, 1675 (1982). We submit that the State has failed to carry its burden.

CONCLUSION

Religion is a private affair between every person and his Maker, in which no third party has any right to interfere. "If everyone is left to judge his own religion, there is no such thing as a religion that is wrong; but, if we are to religion that is right; and, therefore, all the world is right or all the world is wrong.[31] Given this state of affairs, each must be left to go his own way in matters pertaining to religion. "Government should not be allowed, under cover of the soft euphemism of (accommodation) to steal into the sacred area of religious choice". *Zorach, supra,* at 320 (Black, J. dissenting).

Should this Court reverse the Eleventh Circuit and find Alabama's silent prayer law constitutional, the public will receive the clear message that state sponsorship of religious activity is sanctioned. Make no mistake about it, the "effect" of such a ruling will be to advance religion. Tomorrow's headlines will read:

---

[30]Examples of these are Buddhaism and Taosim.

[31]Paine, *Common Sense II,* at 7.

HIGH COURT HAS GIVEN ITS OK TO STATE ENCOURAGED PRAYERS IN PUBLIC SCHOOLS

Do we really want to go down that road with all of its unforeseen consequences? Do we really need to?

The decision of the Court of Appeals must be affirmed.

Respectfully submitted,

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Nos. 83-812 and 83-929

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GEORGE C.. WALLACE, Governor of the State of Alabama, *et al.*,

Appellants,

v.

ISHMAEL JAFFREE, *et al.*,

Appellees.

DOUGLAS T. SMITH, *et al.*,

Appellants,

v.

ISHMAEL JAFFREE, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR APPELLANTS DOUGLAS T. SMITH, ET AL.

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REPLY BRIEF FOR APPELLANTS DOUGLAS T. SMITH, ET AL.

ARGUMENT

A. The Establishment Clause Does Not Prohibit Individual Silent Prayer or Meditation in Public Schools, as Demonstrated by Its Judicial Construction, Intended Meaning, and Contemporaneous History.

The briefs of the appellees and supporting amici are remarkable for their turning of a blind eye to the findings of the trial court below. They assume, as did the Eleventh Circuit Court of Appeals,[1] that this "Court has repeatedly considered and rejected" the historical evidence.[2]

The trial court below premised its preliminary injunction on that same assumption.[3] However, after four days of trial involving the testimony of expert witnesses on the original intention of the First Congress and its contemporaneous history,[4] the trial court dissolved its preliminary injunction[5] and dismissed the actions,[6] holding:

> This Court's review of the relevant legislative history surrounding the adoption of both the first amendment and of the fourteenth amendment, together with the plain language of those amendments, leaves no doubt that those amendments were not intended to forbid religious prayers in the

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[1] *Jaffree v.Wallace*, 705 F.2d 1526, 1530 (11th Cir. 1983).

[2] Brief for American Jewish Congress at 3.

[3] *Jaffree v. James*, 544 F. Supp. 727, 731 (S.D. Ala. 1982).

[4] Testimony and findings also covered subsequent events such as the effect of the fourteenth amendment upon the first amendment and the defeat of the Blaine Amendment. *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. 1104, 1118-26 (S.D. Ala. 1983).

[5] *Jaffree v. James*, 554 F. Supp. 1130, 1132 (S.D. Ala. 1983).

[6] *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1130 and *Jaffree v. James*, 554 F. Supp. at 1132.

> school which the states and their political subdivisions mandate. . . .[7]

While the Court has addressed some historical materials as the basis for its prior decisions,[8] never before has it been confronted with the historical materials presented as evidence and ruled upon as findings of fact by a trial court. Nor has this Court ever focused on the historical evidence on federal support of religion in public education contemporaneous with the first amendment's passage.[9] Nor has this Court been presented with so exhaustive an analysis of the Congressional debates on the first and fourteenth amendments in briefs or oral arguments as it is in these cases.[10] These cases, furthermore, involve historical evidence that was not available to the Court in *Everson*, *Engel*, or *Schempp*.[11]

Not surprisingly, neither the appellees nor their supporting amici address the Northwest Ordinance which provides:

> *Religion, morality* and knowledge, being necessary to good government and the happiness of mankind,

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[7] *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1128.

[8] *See, e.g., Everson v. Bd. of Education*, 330 U.S. 1 (1947).

[9] *See* Brief for Appellants Smith at 15-28 and Brief for Appellants Wallace at 16-30 with separate appendix.

[10] *See* Brief for Appellants Smith at 31-39, 1a-27a and Jurisdictional Statement for Appellants Smith at 11-21.

[11] *Engel v. Vitale*, 370 U.S. 421 (1962), *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963). The Brief for American Jewish Congress at 4 falsely gives the impression that this Court considered Jefferson's 1803 treaty with the Kaskaskia Indians, which provided money to build a church and pay a Catholic priest, in *Quick Bear v. Leupp*, 210 U.S. 50 (1908). *Quick Bear* was not an establishment clause decision (210 U.S. at 81), but, rather, involved the Sioux treaty of April 29, 1868 (15 Stat. 635) and an Act of Congress of June 7, 1897 (30 Stat. 62). The Court in *Quick Bear* certainly did not consider Jefferson's 1803 treaty as evidence that he did not believe in an absolute "wall of separation." *See Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1117.

> schools and the means of education shall forever be encouraged.[12]

Clearly the contemporaneous acts of the First Congress which proposed the first amendment are of preeminent importance in understanding the intended meaning of the establishment clause.[13] Instead, the appellees' amici would once again draw attention away from the acts of Congress as a whole to focus on the views of one legislator alone, Madison, and to the subsequent statements of a non-participant, Jefferson.[14]

The Supreme Court of 1878 engaged in the same erroneous method of constitutional interpretation when it first adopted the phrase "wall of separation." When faced with a claim that polygamy was protected under the free exercise clause, the Court in *Reynolds v. United States*, 98 U.S. 145 (1878), demonstrated an application of the contemporaneous act method of interpretation in its review of the actions of the Virginia legislature. The

---

[12] Northwest Ordinance, Art. III, 1 Stat. 52 (Aug. 7, 1789) (emphasis added). *See* R. CORD, SEPARATION OF CHURCH AND STATE, HISTORICAL FACT AND CURRENT FICTION 61-63 (1982), copies of which have been lodged with the Clerk of this Court.

[13] "The interpretation of the Establishment Clause by Congress in 1789 takes on special significance in light of the Court's emphasis that the First Congress 'was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the *greatest weight in the interpretation* of that fundamental instrument,' *Myers v. United States*, 272 U.S. 52, 174-75, 47 S.Ct. 21, 45, 71 L.Ed. 160 (1926)." *Lynch v. Donnelly*, 104 S.Ct. 1355, 1359 (1984) (emphasis in original). *See also Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1115. The Congressional debates on the first amendment have been addressed in Brief for Appellants Smith at 31-37, 1a-27a.

[14] Brief for Senator Weicker at 10-11. *See Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1115-18 for the trial court's findings on the positions of Jefferson and Madison. *See* J. O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION 66-107 (Leonard W. Levy ed. 1972) and R. CORD, *supra* note 12, at 16-82 for studies of the private statements versus public actions of Jefferson and Madison (excerpts of which are quoted at pages 30a-43a of Appendix to Brief for Appellants Smith).

Court noted that since Virginia passed an act establishing religious freedom, recommended an amendment to the Constitution of the United States ensuring free exercise of religion, and passed an act making polygamy a punishable offense, then polygamy was not intended to be a protected religious freedom.[15]

The *Reynolds* Court, however, completely abandoned the contemporaneous act method of interpretation on the federal side of the equation. In trying to ascertain the meaning of the first amendment of the United States Constitution, the Court did not review the debates to find the intent of Congress and the ratifying state legislatures and did not look to the contemporaneous acts of Congress to find its intent. Instead, it looked to Madison's writing about and for another event, his *Memorial and Remonstrance*, and relied on Jefferson's 1802 "wall of separation" letter, while noting that he was absent as Minister to France during the drafting, debate and adoption of the first amendment.[16]

Recently, in *Marsh v. Chambers*, 103 S.Ct. 3330 (1983), this Court spoke of the importance of the contemporary act method of analysis:

> [H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they though that Clause applied to the practice authorized by the First Congress—their actions reveal their intent. An act "passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning".

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[15] *Reynolds v. United States*, 98 U.S. at 165. Note, though, that these two acts and the amendment recommendation were passed by different bodies at different times. The passage of the Northwest Ordinance at the same time and by the same group of men that passed the first amendment is much stronger evidence of intended meaning. Note also that *Reynolds* was a free exercise clause case and that the "wall of separation" was interpreted within that context. 98 U.S. at 164.

[16] *Reynolds*, 98 U.S. at 163-64.

Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888).[17]

The failure to use this method of recognized constitutional interpretation by the 1878 Court (and of subsequent Courts to correct it) has led to a burdensome load of establishment clause cases for the federal judiciary and contributed to a public lack of confidence in the Supreme Court as an institution.

To properly understand Jefferson's "wall of separation" phrase as it applied to free exercise, it too must be understood within the historical context. Jefferson apparently borrowed phraseology from the Baptist leader and advocate of religious liberty of the previous century, Roger Williams of Rhode Island. Williams had written,

> [W]hen they have opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world, God hath ever broke down the wall itself, removed the candlestick, and made His garden a wilderness, as at this day. And that therefore if He will eer please to restore His garden and paradise again, it must be of necessity be walled in peculiarily unto Himself from the world.[18]

Like Jefferson, Williams spoke of a "wall of separation" between church and state. But to Williams, the "wall" existed to protect the church from the state, not to protect the state from the church. Speaking to a Baptist audience, it seems likely that Jefferson intended the same meaning.

But where was the wall to be placed? What did Jefferson really mean by "state"? It seems likely that he used the term in its generic sense to refer to government in general and the federal government in particu-

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[17] *Marsh*, 103 S.Ct. at 3344.

[18] Roger Williams, *quoted in* M. HOWE, THE GARDEN AND THE WILDERNESS vi (1965).

lar, not to the state governments. For Jefferson recognized that the state governments could regulate religion.[19] In his second inaugural address he said,

> In matters of religion I have considered that its free exercise is placed by the Constitution independent of the powers of the General Government. I have therefore undertaken on no occasion to prescribe the religious exercises suited to them, but have left them, as the Constitution found them, under the direction and discipline of the church or state authorities acknowledged by the several religious societies.[20]

Jefferson's view of the first amendment as expressed in 1805 in his second inaugural address is identical with his view expressed in 1798 when he drafted the Kentucky Resolutions.[21]

The examination of historical materials by previous Courts has indeed been too myoptic.[22] The concurrent, interwoven legislative histories of the Northwest Ordinance and the first amendment[23] clearly demonstrate

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[19] Appellants Smith are indebted to John Eidsmoe, Visiting Professor of Law at Oral Roberts University, for these thoughts. *Accord* R. CORD, *supra* note 12, at 115 and *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1118. *See also* W. MARNELL, THE FIRST AMENDMENT 115-16 (1964) (cited in Brief for Amicus Weicker at 6).

[20] 3 A. BERGH, WRITINGS OF THOMAS JEFFERSON 378 (1903).

[21] 4 THE ANNALS OF AMERICA 63 (1968). In these resolutions, Jefferson also stated that the *federal courts* were excluded from jurisdiction over religious matters.

Justice Story (1770 to 1845), a leading Unitarian of his time who served on the Supreme Court from 1811 to 1845 and as Professor of Law at Harvard Law School, agreed with Jefferson. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1879 at 634 (1891). *See also* Brief for Senator John P. East, *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983).

[22] *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1129.

[23] *See* Brief for Appellants Smith at 15-28.

that the First Congress saw no conflict between the establishment clause and encouraging that religion be taught and prayers be given in the public schools in the Northwest Territory created and supported by grants of federal land.[24] A moment of silence for "mediation of silent prayer" should certainly, then, be constitutional.

B. The Appellees and Amici Argue for an Absolutist Approach to "Complete Separation" of Church and State, an Approach Which this Court Has Consistently Rejected.

The appellees and amici argue for an "impregnable 'wall' " between church and state[25] and "a complete and permanent separation."[26] Just this year, however, this Court in *Lynch* stated expressly that "the Constitution [does not] require complete separation of church and state"[27] and that the Court has "uniformly rejected" an "absolutist approach in applying the Establishment Clause."[28]

Jaffree, moreover, describes the concept of accommodation as "loose language" in Supreme Court opinions[29] and ignores the *Lynch* decision except for two out-of-context references. The concept of accommodation, however, is viewed by this Court as a necessary part of the free exercise clause and the establishment clause, which prohibits hostility or callous indifference to religion.[30] Government may "accommodate religious needs of the people."[31] The "limits of permissible state accommoda-

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[24] *See Lynch v. Donnelly*, 104 S.Ct. 1355, 1359 (1983).

[25] Brief for Appellees Jaffree at 8, 10.

[26] Brief for Amicus Weicker at 5.

[27] *Lynch v. Donnelly*, 104 S.Ct. at 1359.

[28] *Id.* at 1361.

[29] Brief for Appellees Jaffree at 8.

[30] *Lynch v. Donnelly*, 104 S.Ct. at 1359.

[31] *Zorach v. Clauson*, 343 U.S. 306, 315 (1952).

tion to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself,"[32] and "bring us into war with our national tradition."[33] "[A]ccommodation . . . respects the religious nature of our people."[34]

C. Silent "Meditation or Voluntary Prayer" Is Not Controlled by *Engel* or *Schempp*.

Both *Engel v. Vitale*, 370 U.S. 421 (1962)[35], and *Abington School District v. Schempp*, 374 U.S. 203 (1963)[36] involved state mandated religious exercises in public schools. *Engel* also involved a prayer "prescribe[d] by law" which the Court held "officially establishes the religious beliefs embodied in the Regent's prayer"[37] and, although voluntary, involved "indirect

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[32] *Walz v. Tax Commission*, 397 U.S. 664, 673 (1970). Appellees argue against this definition of accommodation when they say that accommodation only applies where there has been a free exercise violation. Brief for Appellees Jaffree at 9, 21-22. Brief for Amici ACLU at 23-26. The fact that the bill's sponsor, Senator Holmes, was asked to introduce such a piece of legislation because his constituency believed that they were prohibited from praying in school (J.A. at 48, 53) appears to be unpersuasive to the appellees.

[33] *Lynch v. Donnelly*, 104 S.Ct. at 1359.

[34] *Id.* at 1360.

[35] "The respondent Board of Education of Union Free School District No. 9, New Hyde Park, New York, acting in its official capacity under state law, *directed* the School District's principal *to cause* the following prayer to be said aloud by each class in the presence of a teacher at the beginning of each school day. . . ." 370 U.S. at 422 (emphasis added). The New York Court of Appeals upheld the use of the prayer if students were not compelled to participate in saying the prayer. 370 U.S. at 423-24.

[36] "[W]e find that the States are *requiring* the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison." 374 U.S. at 223 (emphasis added).

[37] *Engel v. Vitale*, 370 U.S. at 430.

coercive pressure upon religious minorities to conform to the prevailing officially approved religion." [38]

In *Schempp*, the required daily readings from the Holy Bible and recitation of the Lord's Prayer by the students were "religious exercises, required by the States in violation of the command of the First Amendment that the Government maintain strict *neutrality*, neither aiding nor opposing religion." [39]

The silent "meditation or voluntary prayer" statute here does not violate the holdings in *Engel* and *Schempp*. It neither prescribes a prayer, establishes an officially approved religion, coerces conformity, nor violates neutrality. It affords accommodation within strict but "wholesome 'neutrality.'" [40]

This was the apparent consensus of the academic community as evidenced by Professor Tribe's constitutional treatise [41] and Justice Brennan's favorable remarks in *Schempp*.[42] The federal district court in *Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976),[43] came to the same conclusion seven years ago in a case involving a statute similar to the Alabama statute under attack in these cases. In agreement are Circuit Judges Roney, Tjoflat, Hill, and Fay, who joined in a dissenting opinion in a motion for rehearing by the Eleventh Circuit for the case at hand stating: "The testimony of the sponsor of the Alabama law, *Jaffree v. James*, 544 F. Supp. 727, 731 (S.D. Ala. 1982) should not be used to invalidate a

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[38] *Id.* at 431.

[39] *Abington School Dist. v. Schempp*, 374 U.S. at 225 (emphasis added).

[40] *Id.* at 222. *See* Brief for Amicus State of Connecticut at 7-8 and Brief for Amici States' Attorneys General at 9-14.

[41] L. TRIBE, AMERICAN CONSTITUTIONAL LAW 829 (1978).

[42] *Abington School Dist. v. Schempp*, 374 U.S. at 281 and n.57 (Brennan, J., concurring).

[43] *See also Opinion of the Justices*, 228 A.2d 161 (N.H. 1967).

neutral statute which is both facially and operationally constitutional." [44]

If chaplains' prayers,[45] holidays for giving thanks to God,[46] and national days of prayer[47] are constitutional then silent "meditation or voluntary prayer" is a fortiori constitutional.

D. An Alternative to the Tripart Test Should Be Employed, as the Court Did in *Marsh* and *Lynch*.

Appellees Jaffree tell this Court that it "must" use the three part standard fashioned in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).[48] However, this Court has explicitly recognized alternative approaches to the establishment clause besides the tripart test, and has explicitly said that the tripart test is not an exclusive approach to the establishment clause: "[W]e have repeatedly emphasized our *unwillingness to be confined to any single test or criterion in this sensitive area. In two cases, the Court did not even apply the 'Lemon test.'* We did not, for example, consider that analysis relevant in *Marsh, supra*. Nor did we find *Lemon* useful in *Larson v. Valente*. . . ." [49] This decision makes it clear that the tripart test is not exclusive and that alternative tests may and sometimes should be used.

The one alternative test that the Supreme Court has used thus far is a historical test, as employed in *Lynch*.[50]

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[44] *Jaffree v. Wallace*, 713 F.2d 614, 615-16 (11th Cir. 1983) (emphasis added).

[45] *Marsh v. Chambers*, 103 S.Ct. at 3335.

[46] *See Lynch v. Donnelly*, 104 S.Ct. at 1360.

[47] *See Id.* at 1361.

[48] Brief for Appellees Jaffree at 17.

[49] *Lynch v. Donnelly*, 104 S.Ct. at 1362 (citations omitted) (emphasis added). *Accord, Marsh v. Chambers*, 103 S.Ct. at 3335; *Larson v. Valente*, 456 U.S. 228 (1982); *Tilton v. Richardson*, 403 U.S. 672, 677-78 (1971); *see Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973).

[50] *Lynch v. Donnelly*, 104 S.Ct. at 1359 and 1361.

The Court, in applying the alternative historical test in *Marsh*, upheld legislative chaplains on the basis of an extensive discussion of contemporaneous history.[51] The appellants suggest to the Court that the historical test should be applied in this case to the moment of silence for permissive prayer or mediation in public schools, just as it was applied in *Marsh* to uphold the prayers offered by a state-paid chaplain to a state legislature. However, if the tripart test is applied, the primary effect and purpose of a moment of silence are constitutional under *Lynch* and *Marsh*, with no excessive entanglement.

E. The Alabama Statute Permitting Silent "Meditation or Voluntary Prayer" Is a Constitutional Accommodation.

Justice Douglas, writing for the Court in *Zorach v. Clauson*, said the following on accommodation: "When the state *encourages . . . or cooperates with . . .* sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and *accommodates* the public service to their spiritual needs." [52]

This Court has distinguished between toleration and accommodation. In *Lynch* this Court stated unequivocally that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause." [53]

The essence of the difference between toleration and accommodation is the perceived origin of the rights in

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[51] *Marsh v. Chambers*, 103 S.Ct. at 3335. *Accord, id.* at 3338 (Brennan, J., dissenting): "The Court makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal 'tests' that have traditionally structured our inquiry under the Establishment Clause."

[52] *Zorach v. Clauson*, 343 U.S. at 313-14 (emphasis added).

[53] *Lynch v. Donnelly*, 104 S.Ct. at 1359 (citations omitted).

question. When a state tolerates a religion, civil liberties are creatures of the sovereign state's good pleasure. Religious rights are given only if, when, and for as long as expedient. Tolerance becomes intolerance when the good graces of the States or its agents change.

Accommodation, on the other hand, recognizes that liberties exist independent of government, which has not created them. Liberties are, according to the Declaration of Independence, "unalienable Rights" with which men have been "endowed by their Creator," "the Supreme Judge of the World." Jefferson acknowledged the origin of these rights and their dependency on that Source when he said "God Who gave us life gave us liberty. Can the liberties of a nation be secure when we remove a conviction that these liberties are the gift of God?" [54] For, according to Justice Story, quoted in *Lynch*, 104 U.S. at 1361, "[t]he real object of the amendment was *not to . . . prostrat*[*e*] *Christianity; but* . . . to prevent any national ecclesiastical establishment . . ."[55]

Where our courts require that all religions be equated in the public square, toleration rules and free exercise is restricted. A position that prohibits one religion from advancing more than another was abhorrent to the men who wrote the religion clauses according to Justice Story:

> Probably at the time of the adoption of the Constitution, and of the [first] amendment to it . . . the general if not the universal sentiment in America was, that Christianity ought to *receive encouragement from the state* so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to *level all religions*, and to make it a matter of state policy to hold all in *utter indifference*, would have

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[54] Inscribed on the Thomas Jefferson Memorial, Washington, D.C.

[55] 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1871, at 728 (1833) (portions omitted from *Lynch* are set out in italics).

> created *universal disapprobation*, if not *universal indignation*. . . .[56]

The drift from accommodation in early America towards current toleration has been slow yet steady, moving from "this is a Christian nation"[57] to "[W]e are a Christian people, according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God"[58] to "[w]e are a religious people whose institutions presuppose a Supreme Being"[59] to "neither a State nor the Federal Government . . . can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs"[60] to "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God."[61] When the whole spectrum is thus viewed, there is a perceptible drift from accommodation to toleration. The constitutional prohibition against "*an* establishment of religion" has been rewritten to prohibit any encouragement of religion in public, choking free exercise and limiting religious practice to private property.[62]

Appellees Jaffree would have this Court officially redefine accommodation to mean not neutrality but nonrecognition or even discouragement of religion. This would clearly be the "hostility" which the Constitution

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[56] 3 J. STORY, COMMENTARIES, *supra* note 55, § 1868, at 726 (emphasis added).

[57] *Church of the Holy Trinity v. United States*, 143 U.S. 226, 232 (1892).

[58] *United States v. MacIntosh*, 283 U.S. 605, 625 (1931).

[59] *Zorach v. Clauson*, 343 U.S. at 313.

[60] *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

[61] *United States v. Seeger*, 380 U.S. 163, 166 (1965).

[62] *See* R. NEUHAUS, THE NAKED PUBLIC SQUARE 80-82 (1984) for a perceptive discussion of the theological implication of this drift. *Jeremiah* 17:5.

"forbids."[63] Prohibiting a moment of silence would demonstrate hostility in that it would deny "students the free exercise of religion by allowing them to pray only while pretending to be doing some other, officially sanctioned, classroom behavior."[64] To eradicate all religious exercises from public schools would not be neutrality, but hostility toward religion—in reality a "tax supported secularism"[65] which "prefers nonbelief over belief."[66]

Appellants Smith ask this Court to recognize accommodation as required because religious rights are inalienable, that is, God-given. The government, therefore, has an affirmative responsibility to adjust its programs and regulations in recognition of the preexisting religious rights of its citizens. The accommodation of the need for prayer[67] is very similar to the accommodation of the need for religious instruction in *Zorach*. Silence is certainly a neutral accommodation of needs protected by God-given, constitutionally protected rights.[68]

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[63] *Lynch v. Donnelly*, 104 S.Ct. at 1359.

[64] Brief for Amicus Legal Foundation of America at 10. Note the conflicts that state prohibition of all public religious practice set up for individuals as Appellants Smith who believe that they are required to pray to God at all times. *See* testimony of Pixie Alexander (T. 84) and Karen Phillips (T. 664). (T.) refers to pages of the original transcript.

[65] Brief for Amicus Moral Majority at 14.

[66] Brief for Amicus The Freedom Council at 22.

[67] On the needs of prayer generally, *see* Brief for Amici Christian Legal Society and National Association of Evangelicals at 4-7.

[68] *See* Brief for Amicus United States at 14-15. Appellants Smith would draw the attention of the Court to the annual Earth Day Ceremony at the United Nations. If the U.N., with its diverse religious beliefs, can sponsor the ceremony and people around the world can unite in silent prayer or meditation at the moment of the equinox, then the statute in the case at hand can certainly be viewed as a neutral accommodation to the needs of all and as nondivisive. *See* letter by Earth Society Foundation President John McConnell, SIERRA, May/June 1981, at 8.

CONCLUSION

Appellants Smith agree with Senator Weicker that "as evidenced by the works of Jefferson and Madison, our founding fathers firmly established that government has no jurisdiction in religious matters."[69] Jefferson was clear and consistent in his statements that the Federal Government, including the federal judiciary, had no jurisdiction over state religious matters.[70] Congressional debates and the subsequent failure to pass the Blaine Amendment are weighty evidence that the fourteenth amendment did not change the scope and reach of the first amendment.[71]

This case is a jurisdictional case. The trial court made some preliminary findings of fact at the initial hearings on a preliminary injunction.[72] These findings were later vacated when the trial court, after four days of testimony, issued an order dismissing for lack of federal jurisdiction.[73] The court of appeals, overreaching its authority, reached over the order vacating the preliminary injunction to resurrect the findings thereof and even made some findings of its own in order to reach issues left unresolved or unaddressed because of the dismissals.[74]

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[69] Brief for Amicus Weicker at 17. *See* discussions of beliefs of Jefferson and Madison as revealed by their public actions, *supra*, at note 14.

[70] *See* Jefferson's second inaugural address and the Kentucky Resolutions, *supra*, at 6 and note 21, and letter from Thomas Jefferson to Presbyterian clergyman (1808), reprinted in 9 P. FORD, LIFE OF JEFFERSON 174 (1904). *Accord Permoli v. New Orleans*, 44 U.S. (3 How.) 589 (1845).

[71] *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1118-26. *See also* Jurisdictional Statement for Appellants Smith at 11-21.

[72] *Jaffree v. James*, 544 F. Supp. 727 (1982).

[73] *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1130 and *Jaffree v. James*, 554 F. Supp. at 1132.

[74] *Jaffree v. Wallace*, 705 F.2d at 1533, 1535. *Jaffree v. James*, 554 F. Supp. 1130, which vacated the preliminary injunction against

We find it similarly remarkable that a jurisdictional challenge has heretofore not been made to federal jurisdiction asserted over state religious matters left beyond the reach of federal intervention by the first amendment and unaffected by the fourteenth amendment. To our dismay, a thorough review of all the available briefs, including those of amici curiae, and oral arguments in major United States Supreme Court establishment clause cases reveals that no one challenged federal usurpation of exclusive state jurisdiction over state religious matters as prohibited by the first amendment and unchanged by the fourteenth amendment.[75]

When presented with such a challenge, the trial court initially acted in accordance with and gave obedient recitation to the established judicial gospel. Only after going beyond the dogma to the actual history itself was

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the statute and dismissed the complaint, did not contain any findings of fact. The companion case, *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. 1104, contained no findings on this statute.

[75] We examined the oral arguments and all the briefs in the series by P. KURLAND & G. CASPER, THE LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES for the following cases: *Cantwell v. Conn.*, 310 U.S. 296 (1939); *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940); *Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952); *Zorach v. Clauson*, 343 U.S. 306 (1952); *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington Township v. Schempp*, 374 U.S. 203 (1963); and *Wis. v. Yoder*, 406 U.S. 205 (1972).

We examined the oral arguments and all the briefs in library microfiche files for the following cases: *Murdock v. Pa.*, 319 U.S. 105 (1943); *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948); *McGowan v. Md.*, 366 U.S. 420 (1961); *Torcaso v. Watkins*, 367 U.S. 488 (1961); and *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The only case where we can find a fourteenth amendment challenge even raised was *Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952), in Brief for Appellee State of New Jersey, printed in 47 P. KURLAND & G. CASPER, *supra*, at 1000-01. The appeal was dismissed for lack of standing with the Court never having taken jurisdiction. 342 U.S. at 432.

Judge Hand able to conclude "that the United States Supreme Court has erred in its reading of history." [76]

It was on December 4, 1961 that the Court gave the appearance of rejecting the Lord's sovereignty by asserting jurisdiction over prayers to the Almighty.[77] Now 23 years later on December 4, 1984, this Court will entertain oral arguments on another form of communication with God. The issue has not died or withered away. We agree with Senator Weicker that Jefferson was "sensitive to the potential divisiveness of government entanglement with religion. . . ," [78] recognizing that Jefferson spoke of the federal judiciary [79] as well. On the effects of this judicial intrusion into the sanctuary of prayer, Judge Hand observed:

> . . . The framers of our Constitution, fresh with recent history's teachings, knew full well the propriety of their decision to leave to the peoples of the several states the determination of matters religious. The wisdom of this decision becomes increasingly apparent as the courts wind their way through the maze they have created for themselves by amending the Constitution by judicial fiat to make the first amendment applicable to the states. Consistency no longer exists. Where you cannot recite the Lord's Prayer, you may sing his praises in God Bless America. Where you cannot post the Ten Commandments on the wall for those to read if they do choose, you can require the Pledge of Allegience. Where you cannot acknowledge the authority of the Almighty in the Regent's prayer, you can acknowledge the existence of the Almighty in singing the verses of America and Battle Hymn of

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[76] *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1128.

[77] *Engel v. Vitale, cert. granted*, 368 U.S. 924 (1961).

[78] Brief for Senator Weicker at 16.

[79] *See supra*, at note 21.

> the Republic. It is no wonder that the people perceive that justice is myoptic, obtuse, and janus-like.[80]

In a new book on the adverse effects on democracy of "human passions unbridled by morality and religion," Richard John Neuhaus writes:

> The prelude to . . . totalitarian monism is the notion that society can be ordered according to secular technological reason without reference to religious grounded meaning. [John Courtney] Murray again: "And if this country is to be overthrown from within or from without, I would suggest that it will not be overthrown by Communism. It will be overthrown because it will have made an impossible experiment. It will have undertaken to establish a technological order of most marvelous intricacy, which will have been constructed and will operate without relations to true political ends: and this technological order will hang, as it were, suspended over a moral confusion; and this moral confusion will itself be suspended over a spiritual vacuum. This would be the real danger resulting from a type of fallacious, fictitious, fragile unity that could be created among us."
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> This "vacuum" with respect to political and spiritual truth is the naked public square. If we are "overthrown," the root cause of the defeat would lie in the "impossible" effort to sustain that vacuum. Murray is right: not Communism, but the

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[80] *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1129. Appellees, too, are inconsistent and confused. They think it alright for the state to permit "concentration of thought" on the Divine, but not silent prayer to the Divine. Brief for Appellees Jaffree at 10 & n.14, 11. The ridiculousness of such a strained, attempted distinction is demonstrable from the very source they cite, ENCYCLOPAEDIA JUDAICA (1971), which identifies prayer as a form of meditation, 11 *id.* at 1218, and meditation as a form of prayer, 13 *id.* at 978.

> effort to establish and maintain the naked public square would be the source of the collapse.[81]

Such would be the result of the establishment of a "religion of secularism" condemned in *Schempp*, 374 U.S. at 225. The action that Appellees Jaffree request of this Court would be another stride down that road.

John Adams foresaw the danger in such a course of action when he said: "We have no government armed with power capable of contending with human passions unbridled by morality and religion. Our constitution was made only for a moral and a religious people. It is wholly inadequate for the government of any other." [82]

Murray Friedman recently commented on the results of the present course of action urged upon this Court:

> But one may question whether *"silent meditation"* . . . [is] the critical problem[]. . . . May not the breakdown of the orderly norms of our society constitute, in fact, a far more serious threat to the Jewish community? To be sure, displaying the Ten Commandments on a schoolhouse wall would not in itself strike a major blow against the "new paganism," but an argument can be made that *removing the institutional religious supports and symbols of decency may contribute to the decline of morality itself.*[83]

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[81] R. NEUHAUS, *supra* note 62, at 85. *See also id.* at 100-03, 80-82, 84-87. After reading Neuhaus' insightful analysis, one might ponder if Judeo-Christian religious references are becoming the new blasphemy under an established "religion of secularism".

[82] Quoted in R. NEUHAUS, *supra* note 62, at 95.

[83] Keynote speech by Murray Friedman at the annual meeting of the Association of Jewish Community Relations Workers (June 1980), *printed as* Friedman, *A New Direction for American Jews*, COMMENTARY, Dec. 1981, at 43 (emphasis in original and added).

> In striving for the separation of church and state, . . . agencies earnestly believed they were preventing harassment and providing safeguards for Jews, religious dissenters, and non-

In view of the contemporaneous acts of the First Congress and the need to keep the public square open to free religious expression, Appellants Smith desire a reinstatement of the original meaning of the First Amendment, as evidenced by its language, framers' intent and history.[84] However, in the alternative, Appellants suggest that silent "meditation or voluntary prayer" is constitutional, even under the establishment clause precedents of this Court.

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---

believers. Their activities, however, reflected a secular bias that was at best indifferent, when it was not actively hostile, to religion itself. They chose not to see that the "church" they sought to disestablish was not just a sect but embraced a collection of beliefs and values deeply embedded in the society, values which while causing uneasiness in religious outsiders, provided an order and coherence that had made it possible for Jews (and others) not only to live comfortably but indeed to prosper.

Id. at 39.

[84] There has been, "as Mr. Justice Holmes said, 'an unconstitutional assumption of power by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.'" *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (per Brandeis, J.).

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Nos. 83-812 and 83-929

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, *et al.*,
Appellants

v.

ISHMAEL JAFFREE, *et al.*

DOUGLAS T. SMITH, *et al.*,
Appellants

v.

ISHMAEL JAFFREE, *et al.*

Appeal from the United States Court of Appeals for the Eleventh Circuit

---

REPLY BRIEF OF APPELLANT, GEORGE C. WALLACE

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REPLY BRIEF OF APPELLANT, GEORGE C. WALLACE

The appellant has incorrectly characterized Alabama's mediation-or-voluntary-prayer statute as one "attempting to promote or facilitate a religious exercise." Appellee's Brief at 9. He equates providing an opportunity to pray with promoting a religious exercise. What the statute

does is to allow students the opportunity during a minute of silence to meditate on what they will, which may include prayer. Students have the liberty of mind and conscience during a brief moment at the beginning of the day, after which the teacher will dictate what will occupy their minds. The state is not "promoting" religion because it is not directing or counselling what a student should think. Rather, the statute represents a recognition by the state of the limits beyond which it cannot go in dictating the thoughts of the students.

The fact that some students will be praying silently does not make this "group prayer", as the appellee charges. Appellee's Brief at 3. "Group prayer" is vocal and involves a unity of intention or purpose not possible under the instant statute. The only unity or conformity produced by this statute is that of silence and non-activity, at least for one minute during the busy day. During this brief moment, the quiet allows those who wish to do so, to mediate or pray without the distraction of noise or activity.

Many Americans have incorrectly concluded that the Constitution is hostile to religion. Some proponents of a constitutional amendment to allow school prayer are under the misimpression that this Court has prevented students even from praying silently. Some who oppose proposals for a constitutional amendment believe the history, text, and purpose of the Establishment Clause requires the rooting out of prayer even if it means the denial of a student's legitimate right to initiate his own private prayer. By upholding Alabama's meditation-or-voluntary-prayer statute, this Court will have corrected some of the misimpressions on both sides of the public debate and, reaffirmed the Religion Clauses' principle of pluralism.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

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On Appeal from the United States Court of Appeals for the Eleventh Circuit

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF FOR APPELLANTS DOUGLAS T. SMITH, ET AL.

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On Appeal from the United States Court of Appeals for the Eleventh Circuit

---

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF FOR APPELLANTS DOUGLAS T. SMITH, ET AL.

Appellants Douglas T. Smith, et al. move this Court for leave to file the attached supplemental brief pursuant to Rule 35(5) and (6) of the Rules of this Court. In support of this Motion, appellants cite the following:

1. During oral arguments of these consolidated cases before this Court on December 4, 1984, several Justices questioned whether this case presented a justiciable controversy for this Court to decide, possibly requiring dismissal.

2. Rule 35(5) allows a party to present intervening matters that were not available in time to have been included in his brief in chief.

3. Due to the misstatement of counsel during oral arguments which called into question the existence of a justiciable controversy in this case, appellants petition this Court for an opportunity to call the attention of the Justices to evidence which counsel were not familiar with during oral arguments in addition to the brief quotation from the Transcript (T. 184-85), which Appellants Smith transmitted to this Court by letter to the Clerk dated December 5, 1984.

4. In view of the extreme importance of this case and since this issue had never been raised before in the appellate courts to permit briefing, appellants also ask this Court for leave to present cases which this Court has decided which shed light on whether the instant case presents a case or controversy within the meaning of article III, section 2 of the United States Constitution.

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SUPPLEMENTAL BRIEF OF APPELLANTS, DOUGLAS T. SMITH, ET AL.

During oral arguments in this case, Justices White and Stevens questioned whether a justiciable controversy existed as to ALA. CODE § 16-1-20.1 for the following reasons:

1) there was no evidence in the record as to the practice of a moment of silence in the public schools of Alabama, and

2) the statute had not specifically been implemented prior to the trial of this case.

A. Evidence of the Practice of a Moment of Silence

Subsequent to oral arguments, counsel for Appellants Smith pointed out to this Court by letter of December

5, 1984, addressed to the Clerk of this Court, that an error had been made in representations to this Court as to the first assumption above. In fact, there was evidence in the record as to the practice of a moment of silence for permissive prayer or meditation. Julia Green, defendant in *Jaffree v. Board of School Commissioners of Mobile County*, 554 F. Supp. 1104 (S.D. Ala. 1983) (J.S.A. 1d),[1] had testified at trial to the following:

> A. . . . I returned on Monday and I did not let the children say the grace. And the children questioned me. "Mrs. Green, why not, why not? And, I said, "Say it to yourselves. . ."
>
> Q. Do you feel it is anything wrong with them saying it to themselves?
>
> A. No, not if they want to. . . .
>
> Q. Would you have any problems with the grace being said silently?
>
> A. None whatsoever. . . . [T]his year I said to the children "If you want to—we are not going to do grace. I'll tell you what, say it to yourselves if you want to. If you don't want to, you don't have to."...
>
> Q. When you returned that Monday you did not engage in the saying of grace?
>
> A. No, I did not, but I watched to see what would happen. All of the children, including Aakki, at the table, they bowed their heads and to themselves said their little prayer, including Aakki.
>
> Q. What month was this, May?
>
> A. Correct.
>
> Q. And you have been doing this since September?
>
> A. That's right. (T. 184-85)

---

[1] J.S.A. refers to Appendix to the Jurisdictional Statement of Appellants Wallace.

J.A. refers to Joint Appendix.

T. refers to Transcript in the original record.

Based on evidence presented to the trial court, the judge after preliminary hearing found that a justiciable controversy as to the challenged statute existed. *Jaffree v. James*, 544 F. Supp. 727, 730 (1982) (J.S.A. 64d, 68d).[2]

Appellants Smith submit that any lack of evidence as to the practice of a moment of silence should not be determinative of whether a case or controversy exists. In *Murray v. Curlett*, consolidated for on appeal with *Abington School District v. Schempp*, 374 U.S. 203 (1963), this Court held the Rules of the Board of School Commissioners of Baltimore City were in violation of the establishment clause *without any evidentiary record at all.* This Court relied on the pleadings without any finding that the Rules were being applied in a discriminatory way or even that they were being applied to the Murrays. The Murrays' suit for mandamus to compel rescission of the Rules had been dismissed on demurrer by the Board of School Commissioners prior to the taking of evidence. *See Murray v. Curlett*, 228 Md. 239, 179 A.2d 698 (1962).

B. Implementation of the Moment of Silence Statute

As to the second issue raised by the Justices, Appellants Smith refer this Court to the Second Amended Complaint of Appellees Jaffree at paragraphs 32(d) through 32(f) (J.A. 25) and to the statements made by Jaffree's counsel during oral arguments to the effect that the statute was in fact being implemented in Mobile's public schools. Counsel for Jaffree stated during oral arguments that Appellees had been prevented by the trial judge from introducing evidence of specific teachers and instances where this statute was being applied although they sought to do so. (T. 168, 288)[3]

---

[2] *See also* references in the transcript to silent prayer at T. 94, 95, 118, 127, 131, 146, 180-81, and 186.

[3] Perhaps counsel for appellees did not recall during oral arguments the testimony of Julia Green referred to above.

[Footnote continued]

This Court, however, has not always required evidence of implementation of a statute in order to find a justiciable controversy exists. In *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), the Court struck down as an establishment of religion two sections of a New York law aiding non-public schools and upheld three others without any factual record or discovery. Suit was brought "almost immediately after the signing of these measures" by residents and taxpayers of New York, some of whom had children attending public schools. 413 U.S. at 762. "[T]he case was decided without evidentiary hearing. Since the questions before the District Court were resolved on the basis of pleadings, that court's decision turned on the constitutionality of each provision on its face." *Id.* & 413 U.S. at 809 n.5. (Rehnquist, J., dissenting).[4]

Even if this Court were to find that teachers were not conducting a moment of silence under the authority of ALA. CODE § 16-1-20.1, as appellees allege they were, the precedents of this Court indicate that the passage of the statute and the alleged intent of teachers to act under its authority is enough to find that a case or controversy

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[3] [Continued]

It should not be surprising that teachers did not refer specifically to the moment of silence law in their testimony to the trial court in November 1982, as authority for conducting classroom exercises. The district court had enjoined the state from enforcing this statute on August 9, 1982 by preliminary injunction. *Jaffree v. James*, 544 F. Supp. 727 (1982) (J.S.A. 64d). However, the statute was in effect in May of 1982 when defendant Green began her practice of a moment of silence.

[4] *See also Beck v. McElrath*, 548 F. Supp. 1161 (M.D. Tenn. 1982), striking down Tennessee's moment of silence statute without the production of any evidence as to implementation of the statute. "Schools were not in session when the hearing in this case was conducted," the trial court noted, relying on the legislative history of the act to find it unconstitutional. *Id.* at 1164.

And *see Epperson v. Arkansas*, 393 U.S. 97 (1968) where there is no evidence that the anti-evolution statute was ever applied.

exists. A mere *intent* to enforce a statute without actual enforcement or implementation was adequate for this Court to find that a case or controversy existed in *Public Utilities Commission of California v. United States*, 355 U.S. 534 (1958). Even though the government alleged that it had not done anything or threatened to do anything adverse to the complainant, the Court did not require the complainant to wait until the statute was enforced against it before bringing an action to have the statute declared unconstitutional. *Id.* at 539.[5] And in *Larson v. Valente*, 456 U.S. 228 (1982), this Court also recognized that a case and controversy existed although the statute had never been implemented. The evidence indicates that the Minnesota Department of Commerce had only notified the appellee Unification Church that it was required to register under the newly enacted provisions. *Id.* at 232.

However, where the case involves significant establishment clause issues, this Court has not always required that the record indicate that the government even intended to apply the statute in question. In *Stone v. Graham*, 449 U.S. 39 (1980), this Court apparently relied on representations made in an amicus brief that the statute had been implemented. *See Stone v. Graham*, 599 S.W.2d 157, 159 (Ky. 1980). There is no finding by either court that the statute was being carried out.

This same principle has been applied in other first amendment cases. In *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961), the Court permitted petitioner to challenge *on its face* a statute apparently involving prior restraint or censorship of motion pictures. The record is clear that petitioner had not complied with the terms

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[5] A mere plan or intent to act was held adequate to provide a justiciable controversy when the government activity would cause a "chilling effect" to complainants' free speech rights in *Socialist Workers Party v. Attorney General of the United States*, 419 U.S. 1314 (1974).

of the statute or been damaged by the statute's application to it.

In *California v. LaRue*, 409 U.S. 109 (1972), Mr. Justice Douglas, dissenting, noted that the case involved "a challenge of the constitutionality of the California rules *on their face*; no application of the rules has in fact been made to appellees by the institution of either civil or criminal proceedings." *Id.* at 120 (emphasis added). Yet both Justice Douglas and the Court agreed that the case met requirements of a justiciable controversy. The Court relied on a stipulation by the government that they would take disciplinary action against those violating these rules. *Id.* at 113 n.3. The Court added that "a number of our cases have permitted attacks on First Amendment grounds similar to those advanced by appellees," citing *Zwickler v. Koota*, 389 U.S. 241 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); and *Baggett v. Bullitt*, 377 U.S. 360 (1964).[6]

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[6] *See Clements v. Fashing*, 457 U.S. 957 (1982), where this Court held that "the uncontested allegations in the complaint [were] sufficient to create an actual case or controversy." *Id.* at 962. The record as reported by this Court and the court below does not indicate that any evidence was introduced to show that the challenged statute would be enforced against the complainants. The statute was judged on its face only. *Fashing v. Moore*, 489 F. Supp. 471 (W.D. Tex. 1980); *Moore v. Fashing*, 631 F.2d 731 (5th Cir. 1980).

See also Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974). The Court held there that where a statute will inevitably come into operation, it is irrelevant that there will be a time delay. "One does not have to await the consummation of threatened injury to obtain preventive relief," quoting *Penn. v. W. Va.*, 262 U.S. 553 (1923). *Regional Rail Reorganization Act Cases*, 419 U.S. at 143.

And see *S.C. v. Katzenbach*, 383 U.S. 301 (1966), where this Court held that nothing more than a new amendment to a state voting law was needed to create a case or controversy which would permit a federal court to pass on the constitutionality of the amendment. The amendment need not be applied by the state. The federal court could examine the amendment on its face.

C. Criteria for a Justiciable Controversy

This Court in *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227 (1937) set forth the criteria for determining if a controversy met the requirements of Article III, Section 2 of the United States Constitution, as well as of the Declaratory Judgment Act:

(1) The controversy must be *definite and concrete*, touching the legal relations of parties having adverse legal interests.

(2) It must be a real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a *hypothetical state of facts.*

(3) There must be a concrete case admitting of an *immediate and definitive determination* of the legal rights of the parties in an adversary proceeding *upon the facts alleged. Id.* at 240-41.

Appellants Smith argue that the nature of this controversy is concrete. Appellants Jaffree objected to and sought an injunction against all religious activities and instructional materials used in public schools of Mobile County (Complaint at J.A. 11). He further objected to his children being exposed to prayer. (T. 211) Since defendant Julia Green testified that Appellee Aakki Jaffree, who was in her class, participated in a moment of silence for permissive prayer or meditation, Jaffree would object to this activity because of its religious and repetitive nature (T. 247) and because he finds prayer offensive. (Finding of district court in *Jaffree v. James*, 544 F. Supp. at 729) (J.S.A. 67d.)[7]

Appellants also argue that no hypothetical state of facts is alleged. There is no dispute in the record that

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[7] Jaffree's complaint was directed against any repetitive reference to diety (T. 160, 247) even in the context of the Pledge of Allegiance (T. 225, 248). He also objected to the government's publishing a document referring to a citizen's God-given rights (T. 286).

the State of Alabama has enacted § 16-1-20.1 and that public school teachers in Mobile County including the teachers of Appellees Jaffree may conduct a moment of silence under its authority. Nor is there any question that defendant Julia Green conducted a moment of silence for permissive prayer or meditation daily in the class of Appellee Aakki Jaffree from May until the date of the trial in November 1982.[8] There is no dispute that Appellee Aakki Jaffree participated in this exercise. Nor is there any question that Appellee Ishmael Jaffree objected to these exercises, which he characterized as "religiously based prayer activities." (J.A. 25)

Finally, Appellants Smith urge that under the above set of facts, this Court immediately and definitively can determine the legal rights of the parties. The Court may determine, as did the appeals court below, that Appellees Jaffree have a constitutional right to enjoin the State of Alabama from permitting its teachers to conduct a moment of silence. Or it may find, as did the trial court, that the accommodation of rights of other students and teachers in the free exercise of their religion under the authority of God and the first amendment prohibits such an injunction in favor of appellees.

CONCLUSION

For the reason that this case meets the criteria of *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227 (1937) and the evidentiary and implementation tests discussed in the first part of this brief, appellants ask this Court to find that a justiciable controversy exists under Article III, section 2 of the United States Consti-

---

[8] Several of the teachers testified that they would be forced to choose between continuing their employment and following their religious beliefs if they were prohibited from praying at school. (T. 84, 664). Since the appellate court has prohibited teachers from praying verbally in class, *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983) (J.S.A. 1a), it is presumed that the teachers are now praying silently in class.

tution, even as the district court below found in *Jaffree v. James*, 544 F. Supp. at 730. (J.S.A. 68d)

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